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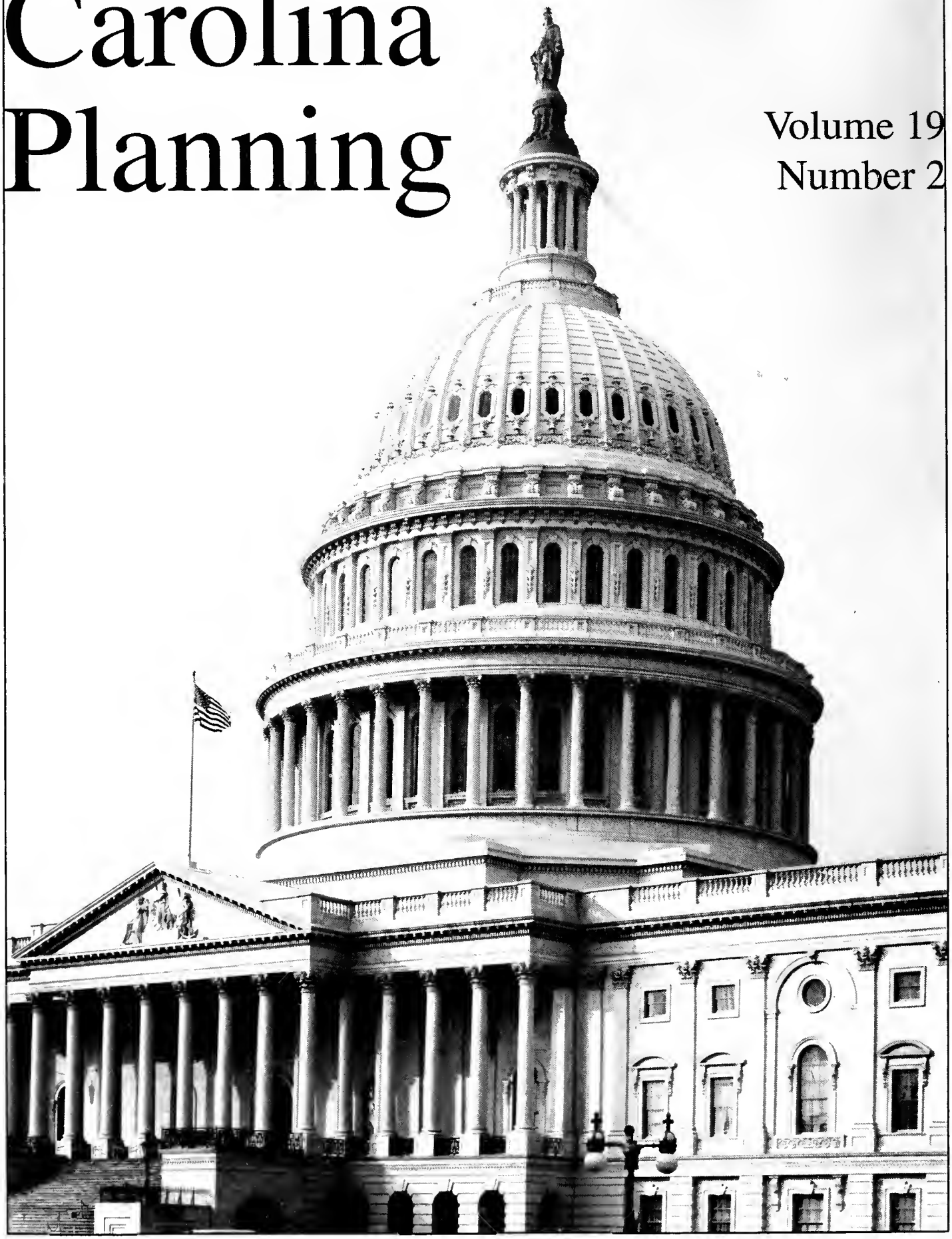

Federal Mandates

Editors' Note

One of the greatest challenges facing planners is how to handle the myriad of laws and regulations that are introduced every day. Whether you practice economic development or transportation planning, coastal management or housing development, understanding governmental mandates is becoming an increasingly important skill for today's planner.

This issue of *Carolina Planning* focuses on several mandates and their effects on a variety of different planning fields. The articles presented are both prospective and retrospective and discuss federal mandates which impact transportation and land use, air and water quality, and housing and coastal management and range from the relative newcomer, 1991's Intermodal Surface Transportation Efficiency Act (ISTEA), to the more grizzled Clean Air Act which has its' roots in California laws passed in the late 1940's. All the articles, however, share the common theme that planners can not ignore what happens in Washington, D.C.

David Bonk discusses the particular challenges of implementing the broad, multi-modal recommendations and the inter-governmental (local and state) goal-setting requirements of ISTEA in a state with a primary mandate for, and a long history of, increasing intra-state mobility and improving access to its extensive rural areas through highway construction.

In an historical piece, Beth Hilkemeyer provides a legislative and social timeline for the automobile's impact on air quality in her examination of the effectiveness of the technology-forcing elements of the 1970 Clean Air Act. This analysis is particularly enlightening and thought-provoking in view of the technological requirements for automobiles set out in the 1990 Amendments.

Mary Eldridge and Eric Stein address a more recent mandate, the Federal Housing Act of 1988, and illustrate its effectiveness by discussing how several communities in North Carolina have altered their programs for the provision of housing for individuals with mental disabilities.

One of the greatest difficulties in interpreting federal mandates lies in the overlap; of multiple pieces of legislation or of impact areas which do not follow jurisdictional lines. Jessica Cogan and Mark Imperial tackle this issue in their discussion of the role of consistency requirements in the resolution of a dispute over water resources between Virginia and North Carolina. Craig Bromby provides insights into proposed changes to the Clean Water Act and how these changes might affect local environmental management.

In the final two articles, Debbie Warren and Peter Skillern discuss how federal legislation can have significant impacts on lending practices to minorities and the disadvantaged. Warren writes about the Community Reinvestment Act of 1977, which is only now being enforced with regularity, while Skillern details an analysis of how effective financial institutions in North Carolina have been in meeting the provisions of the Home Mortgage Disclosure Act of 1975

The articles presented here cover a wide range of planning issues but barely scratch the surface of interplay between local or state planning and federal initiatives. We believe that the variety of pieces does illustrate how pervasive federal legislation is in most planning activities. And we hope that this issue will provide either some new tools for facing federal mandates, or at least the knowledge that, in addressing outside directives, you are not alone.

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In the Shadow of ISTEA

David Bonk

Between the idea and reality falls the shadow--T.S. Elliot

The passage of the 1991 Intermodal Surface Transportation Efficiency Act (ISTEA) seemed to present the urban areas of North Carolina with an historic opportunity to play a much greater role in the development of transportation plans and the funding of transportation projects. As the name of the Act implies, Congress intended that federal transportation policy would promote multi-modal planning for the nation's transportation system.

The most important changes in federal transportation policy included in ISTEA deal with the roles of metropolitan planning organizations in the development of transportation policies and how those policies are reflected through the funding of projects through transportation improvement programs. Metropolitan planning organizations and the local governments that comprise them argued that the transportation problems in urban areas required a flexible approach to problem solving. They insisted that, as with many other problems, those officials that were closest to the problem had the best understanding of what the local community wanted to do to solve the problem. ISTEA attempted to provide the largest urban areas with a far greater degree of local responsibility and authority to solve those transportation problems. Although ISTEA represented a fundamental change in federal transportation policy, the interpretation and implementation of ISTEA by the North Carolina Department of Transportation has limited its impact on the state's urban areas.

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Institutional Background

In order to understand the problems in implementing ISTEA in North Carolina, it is important to understand the transportation policy and funding system that has evolved over the past 70 years. The state of North Carolina has a very strong presence in transportation issues. Unlike other states, where counties and townships have responsibility for local road construction and maintenance, North Carolina's State Department of Transportation is responsible for the vast majority of roads throughout the state. Although local governments play a role in constructing and maintaining local streets, by and large roadbuilding and maintenance is a state responsibility.

The structure for overseeing the implementation of state transportation policy is centered on the State Board of Transportation. The Governor appoints boardmembers who represent fourteen highway divisions within the state and nine at-large members. Legislative leaders appoint two of those Boardmembers. The Board of Transportation has responsibility for setting state transportation policy and allocating transportation funds. The funds available for transportation projects are made up of federal allocations and gas tax revenue collected by the state. While the use of state funds is governed by North Carolina legislative regulations, the federal monies the state receives are governed by federal regulations. In FY 1993, federal transportation funds available to North Carolina totaled approximately $423 million.

In the late 1980s, the North Carolina legislature passed a multi-billion dollar Highway Trust Fund program, funded by an increase in the state gas tax, to construct Urban Loops and widen rural roads. These Urban Loops are specifically identified in the legislation. This legislation included a formula for distributing the Trust Fund to seven regions across the state. The formula allocates 25 percent based on an equal distribu-

tion, 25 percent on the percentage of intra-state road miles to complete within the region, and the remaining 50 percent is based on population. This formula is also used in the distribution of federal transportation funds.

In the early 1970s, the federal government established a metropolitan planning process related to the use of federal transportation funds. Areas with populations over 50,000 were designated as Metropolitan Areas and allowed to establish Metropolitan Planning Organizations (MPOs). These MPOs and the state were required by federal rule to adopt a "comprehensive, cooperative and continuing" planning process. Despite MPOs' role in the planning process, control over federal funds remained firmly under the control of the state. The only power the MPOs were granted was a negative veto; they could remove a project from the Transportation Improvement Program, but had no power to reallocate the funds associated with that project or direct that other funding be provided to any other project. The Transportation Improvement Program, covering a seven-year period, is the spending blueprint that guides all expenditures of federal transportation funds. No federal monies can be spent on a project that does not appear in that Program.

Transportation Improvement Programs

The North Carolina Board of Transportation established a Transportation Improvement Process that required individual local governments to submit transportation "wish lists" on an annual basis. These lists ostensibly were then used by the Board of Transportation and NCDOT staff to allocate transportation funds. There were no objective criteria set out that provided insight into the allocation process and Board members had a great deal of flexibility in allocating transportation funds without any strict accountability.

This system, which concentrated power with the State Board of Transportation, led some MPOs to contend that there was in fact a grossly uneven playing field. Although North Carolina was somewhat unique, this tension between MPOs and State DOTs was widespread. The 1991 passage of ISTEA sought, in part, to correct deficiencies in the process. While ISTEA affects all facets of federal transportation policy, the two areas that represent the most dramatic changes involve federal funding categories and the roles that MPOs, particularly those with populations over 200,000, play in the development of transportation plans and the transportation improvement program.

MPO Responsibility

Prior to the passage of ISTEA, MPOs argued that they should be given more responsibility for developing transportation plans for their areas and that transportation funding decisions should be tied to those plans. They contended that local governments, as represented by the MPOs, were in a much better position to reflect local needs and express local preferences for alternative modes of transportation.

Congress responded to these arguments by incorporating into ISTEA provisions strengthening the role of MPOs. Urban areas must now prepare long range, comprehensive transportation plans which must integrate roadway, public transit, bicycle and pedestrian projects, and must be used as the basis for preparing the local Transportation Improvement Program. ISTEA includes a provision that the metropolitan planning process involve, at a minimum, fifteen explicit components, including: consistency with energy conservation, consistency with land use and development, congestion prevention, and methods to expand and enhance the use of public transit.

The greatest responsibility was given to urban areas with population over 200,000. These areas were designated in the ISTEA as Transportation Management Areas (TMAs). In North Carolina, the Charlotte, Raleigh, Fayetteville and Durham-Chapel Hill-Carrboro Urban Areas are TMAs. In addition to the other requirements, TMAs are required to develop Congestion Management Systems. These TMAs were also given broader responsibility for the development of the local Transportation Improvement Program and selection of projects. The development of TIPs was now a cooperative process between each MPO and the state. The state now required a realistic TIP, meaning that jurisdictions could no longer submit wish lists that were not fiscally feasible.

Federal Transportation Funding

ISTEA completely revised the federal transportation funding program, which had provided separate categories for highway and transit projects. ISTEA modified these categories, providing funds for the National Highway System (NHS), Surface Transportation Program (STP) and Congestion Management Air Quality (CMAQ) programs. While NHS funds can only be used on highway facilities designated part of the national system, STP funds can be used for any transportation purpose, including public transit projects.

Within the STP, there is a provision that TMAs be given a direct allocation, to be spent at the discretion of the TMA on projects selected by the TMA. For FY 1992 and FY 1993, these direct funds totaled approximately $30,226,000 for the four TMAs in North Carolina.

In addition, ISTEA stipulates that ten percent of the total amount of STP funds provided to the state be set aside under the Enhancement Program. This Enhancement Program, totaling approximately $14 million for North Carolina in FY 1993, can be used for a variety of transportation related projects, ranging from historic preservation to scenic beautification to bicycle-pedestrian projects.

Issues

The Durham-Chapel Hill-Carrboro Urban Area Transportation Advisory Committee (TAC) has engaged the NCDOT in continuing discussions over the implementation of ISTEA. The TAC has raised several concerns to NCDOT about the manner in which the preliminary guidelines for implementation were being interpreted. These disagreements with the state led to the urban area missing several deadlines for approving the TIP, requesting a meeting with representatives from the U.S. Department of Transportation, and testifying before a Congressional subcommittee about these concerns. The issues the Durham TAC has raised, many of which remain unresolved, should be of interest to all urban areas of the State, particularly the three other TMAs: Charlotte, Raleigh, and Fayetteville.

TIP Development and Project Selection

The development of the Transportation Improvement Program and project selection are among the most contentious points between the TMAs and NCDOT. Under the system that guided North Carolina transportation spending, all decisions were made by the Board of Transportation. All related information concerning the financing of projects was held exclusively by the State Department of Transportation.

ISTEA assumes that the process for developing a TIP and selecting projects should occur generally in the following manner: the state provides the urban area with an estimate of anticipated federal revenue, by funding category, NHS, STP, CMAQ, etc. for a minimum of a three-year period; the urban area and the state agree upon a list of projects to be included in the TIP--projects that could reasonably be undertaken given the general levels of anticipated funding; this local TIP is included in total in the state TIP; and the urban area selects projects for funding after prioritizing the projects in the TIP. This project selection responsibility would be the *sole* responsibility of the urban area, with the state providing advice.

The real process occurs in the following manner: the urban area develops a priority list of projects for submission to the state; the State Board of Transportation develops a draft state TIP *before* the urban area develops a local TIP; the draft state TIP is submitted to the urban area, with projects already selected for their approval; and the urban area must develop a local TIP that is completely consistent with the state TIP.

In trying to fulfill the federal requirement for developing a fiscally constrained TIP, the Durham Urban Area requested that the state provide the Urban Area with estimates of anticipated future funding. The state's response was that they could not provide the urban area with an estimate of funds because funding decisions are made on a division basis. The Durham Urban Area is split by three NCDOT divisions. The urban area has argued that, if the state division system is at odds with the federal requirements in the development of the TIP, the state system should be modified.

Both the state divisional organization and the state allocation formula, which uses that arrangement, have the potential to skew funding decisions. Urban areas,

The Durham Urban Area would like more funds for bicycle and pedestrian projects.

which are the focus of federal transportation policy, may not get their fair share of federal transportation funds. For example, Orange County is in Highway Division 7, which includes Greensboro. Even if the Orange County portion of the Durham Urban Area receives no funding because it is part of a larger area, the state could point to projects outside the urban area as proof that there has been a fair distribution of funds. Not surprisingly there has been no agreement between the state and the urban area over the differences in this process.

ISTEA is very clear that transportation funds should be allocated based on need and avoid predetermined formulas for distribution. If the state can successfully argue that a distribution formula is justified, however, then the criteria used to allocate funds must not ignore factors such as congestion, air quality and other considerations that ISTEA has sought to emphasize.

Status of Direct Allocation STP Funds

The Durham Urban Area has argued that Congress specifically earmarked the Direct Allocation STP funds to be allocated by each TMA. The Durham MPO maintained that there were bicycle, pedestrian, and transit projects that should be funded from this Direct Allocation money. Although the state initially disagreed, they later admitted that the urban area did indeed have the right to allocate the funds as they saw fit. They had, however, taken the liberty of allocating these new funds to projects that had been previously programmed in the state TIP. They stated very clearly that there were no other funds available and if the urban area removed the Direct Allocation Funds those projects, which were slated to be funded with those monies, would be canceled. The Durham Urban Area refused to approve the 1993-1999 TIP until this issue was resolved. The issue was resolved when the State agreed to allow the Durham Urban Area to have complete control over $2.2 million dollars in FY 1993 funds, and complete control over all Direct Allocation Funds, estimated annually to total approximately $2.5 million, from FY 1997 forward.

STP Enhancement Funds

The Durham Urban Area has been arguing for a number of years that the state must do more to fund bicycle and pedestrian projects in North Carolina. The passage of ISTEA and the creation of the Enhancement Program, which puts bicycle-pedestrian projects at the top of the urban area's list of eligible projects, led the urban area to anticipate an expansion of the Bicycle Program. In FY 1994, North Carolina received approximately $13 million. The bicycle/pedestrian program will only receive $2.2 million. Over $4 million is being allocated to Historic Railroad Station Preservation and $3.4 million to a "discretionary" program. The Durham Urban Area believes that the MPOs across the state should play a greater role in determining the suballocation of the Enhancement Program among various projects. The "discretionary" program, which is understood to be allocated at the discretion of Board of Transportation members, lacks the accountability that federal rules require.

State Pedestrian Policy

ISTEA places greater emphasis on alternative modes of transportation, including pedestrian facilities. This inclusion of pedestrian considerations conflicted directly with a state prohibition of using transportation funds to construct new pedestrian facilities. While the Board of Transportation subsequently modified their policy with regard to pedestrian facilities, it is uncertain whether the new policy, which many local officials thought did not go far enough, will result in any substantial investment in pedestrian facilities. Funding for pedestrian projects, as reflected through the enhancement category of the state TIP, is not provided through FY 1995.

Future Directions

The implementation of ISTEA, particularly in North Carolina, has been an evolutionary process. The promise of ISTEA has far exceeded the reality of the process. Adding to the natural confusion of changing the deeply ingrained system in North Carolina has been the ambiguity of the preliminary guidelines prepared by U.S. DOT to guide the transition. At a meeting with Federal Highway Administration representatives to resolve some of the outstanding issues between the Durham MPO and NCDOT, one U.S. DOT staff member labeled the project selection provision in ISTEA, under the NCDOT TIP process, "essentially meaningless".

The U.S. DOT released their final regulations in November, 1993. While the full impact of these final regulations will take some time to be determined, a quick review indicates that both sides in the debate will find support for their positions. Given the history of ISTEA to date, further clarification of the issues discussed above will be necessary.

Whatever the outcome, it is fair to say that ISTEA has changed forever the way transportation planning and funding is conducted in North Carolina. Whether the urban areas of the state take full advantage of the opportunities afforded by ISTEA will ultimately be decided by their willingness to take on, and possibly antagonize a very powerful state DOT. While the risks are many, the rewards are great.CP

Technology-Forcing Regulation: The Case of Automobile Emissions Technology

Beth Hilkemeyer

Recently there have been many calls for a new relationship between business and the environment. People worldwide are concerned about environmental degradation and about the relationship between industrial development and the health of the environment. Environmental technology is considered a growing area in which the United States could develop a competitive advantage. As Vice President Al Gore asserts in his influential book, *Earth in the Balance*, leadership on the environment is "in our economic interest," and "we can prosper by leading the environmental revolution and producing for the world marketplace the new products and technologies that foster economic progress without environmental destruction."[1] There is also a call for a change in the way that government interacts with business to promote environmental protection. Some state that government should "make markets work"[2] through the use of economic incentives, and others believe that government should directly promote research and development.

However, government promotion of technological innovation is nothing new. "Technology-forcing" policies were used over 20 years ago--in the 1970 Clean Air Act--to force innovation within the automobile industry. This article presents a brief case study of this effort: the development of emissions technology for mobile sources that is, automobiles and light trucks, under the 1970 Act. This effort was only one part of the Act, which also regulated stationary sources such as electric utilities. An important lesson from this case study is that policies to promote technological innovation often must reflect complex interactions between the technical problem itself, industrial structure, and the political process.

In the 1990 Amendments to the Clean Air Act, several new types of policy instruments have been included in both the mobile and stationary source provisions [see sidebar, page 11]. This article does not discuss these provisions, although it will be interesting to see what the response of industry is to this latest attempt to force technology.

Beth Hilkemeyer is a second-year Master of Regional Planning student at the University of North Carolina at Chapel Hill. This article grew out of work begun last summer at Resources for the Future, an environmental policy think-tank in Washington, D.C. Hilkemeyer is currently completing her degree in Vienna, Austria, studying at the Wirtschaftsuniversitaet Wien (Vienna University of Business and Economics).

The History of the 1970 Clean Air Act

Smog, defined as hazy and irritating photochemical air pollution, first appeared in Los Angeles in the early 1940s. Since that time it has been responsible for damage to buildings, crops, and human health. The severe problem which developed in Los Angeles led to research implicating the automobile as a significant polluter, and then to legislation in California in the early 1960s which required the use of emissions control devices after they had passed a certification process.

Over time, smog became a national problem. Successive federal air quality legislation culminated in the Clean Air Act of 1970. This ambitious legislation set "technology-forcing" emission standards for 1975 model-year cars and also regulated stationary sources. The technology-forcing emissions standards were set to protect human health and were set beyond the capabilities of then-known technologies. One of the reasons for this approach was the suspicion that auto companies were not doing all that they could to develop and implement control technologies. It was thought that the combination of tough standards and a short deadline (five years) would force the auto companies to devote more resources to solving this problem.

The 1975 standards were not met on time. The deadline was rolled-back several times and standards were finally met during the 1980s. During this time, technology advanced incrementally. Early responses to the legislation first included engine modifications and then simple catalytic converters. Later, three-way catalytic converters, capable of controlling all three major exhaust pollutants, and microprocessors were introduced.

Despite this progress, ambient air quality in many urban areas is still not adequate to protect human health.[3] Many reasons can be given for this including the possibility that a more radical change in automotive technology is needed--a move away from the gasoline-powered internal combustion engine. However, it should be noted that technology is not the only, and perhaps not even a sufficient, avenue towards attainment of this goal for all urban areas:

> When we analyze the failure of the 1970 Clean Air Act Amendments to reduce pollution from automobiles to the extent envisioned by Congress, several factors stand out. First, the growth in the total number of automobile vehicle miles travelled every year, combined with less stringent control requirements for other mobile sources, reduces the overall gains achieved by the standards that apply to the individual automobile. Moreover, the standards as such are not achieving the full benefit intended, mainly because of poor vehicle maintenance. Deterioration in fuel quality and the stipulation in the law that emission-control requirements apply only for five years or 50,000 miles--roughly half the lifetime of a car--also contribute to the problem.[4]

This article is concerned with only one piece of the pie: the development of emissions technology. The story of this technology is largely the story of the catalytic converter, presented below.

The Catalytic Converter

Catalytic converters are tailpipe devices that use catalysts mounted on a metal honeycomb or on pellets to change harmful gases to less harmful ones. The chemical processes and the basic design of converters were conceived early in the development of emissions control systems, and prototypes had been developed as early as 1957. However, these early prototypes did not meet common-sense requirements for implementation: they were too big, they did not reduce hydrocarbon and carbon monoxide emissions sufficiently, they were costly, their replacement costs were high, and they did not last long. Durability and cost were the chief problems. Catalytic converters were "poisoned" by the lead in gasoline so they soon stopped working. In addition, the catalysts often used precious (and expensive) metals such as platinum. The durability problem was greatly eased by the introduction of unleaded gasoline in the 1970s.

The development of an effective catalytic control device was difficult. First, the device had to operate effectively for years under conditions of high temperature and changing gas mixtures in the exhaust. Second, the catalysts were originally designed to "clean" only some components of emissions. The later introduction of microprocessors allowed the precise control of gases in the exhaust and therefore, the use of catalysts that were better able to "clean" more components of emissions.

Development of the catalytic converter was not consistently pursued from its genesis in 1957 through to its widespread adoption in the mid-1970s. During the 1960s the automobile industry had largely abandoned research on this technology because engine modifications and other technologies met the needs of the California standards.[4] Intensive research was begun after the passage of the 1970 Clean Air Act.[5]

Specific factors constrained the rapid development of the catalytic converter prior to and following the adoption of the 1970 legislation:

- *The high cost of installation and maintenance.* Under the 1970 act, legislators balanced costs against the benefits of better emissions control by requiring durability of only 50,000 miles. This meant that the consumer would not have to replace the catalytic converter.
- *The need for coordination with other industries (here, the petroleum industry).* The widespread adoption of the catalytic converter coincided with the requirement that new cars use unleaded fuel.
- *The nature of the technology itself.* A lot of vibration and great variation in temperature take place within an automobile. Catalytic converters were originally not rugged enough, and are still not effective over the entire temperature range of operation. Microprocessors have increased the effectiveness of catalytic converters by more closely controlling combustion.

Criticisms of the 1970 Clean Air Act's "Technology-Forcing" Approach

The above description of the development of the catalytic converter touches on some of the complexities that were involved in the development of this technology. One criticism of the 1970 Act is that it did not acknowledge these complexities. Even prior to subsequent deadlines, some analysts criticized the structure of the Clean Air Act. One book from this period, *Clearing the Air: Federal Policy on Automotive Emissions Control*, states "the regulatory mechanisms set up in the Clean Air Act are too primitive for the complex technical and manufacturing processes to which they have been applied."[6]

The 1970 Clean Air Act's "technology-forcing" pro-

Clean Air Chronology--

1925 -Public Health Service, a federal agency, studied carbon monoxide in automobile exhaust.

1940s -Smog first noticed in the Los Angeles area.

1943 -"Daylight Dimout" on September 8 in Los Angeles.

1947 -*Air Pollution Control Act* allowed California counties to establish air pollution control districts although permits could not be used on motor vehicles.

-Stanford Research Institute (SRI) began studying air pollution.

1948 -20 deaths and 6,000 cases of illness in Donora, Pennsylvania and up to 800 deaths in London, England are attributed to poor air quality.

1951 -Dr. A.J. Haagen-Smit at the California Institute of Technology identified the basic processes that create photochemical smog. Motor vehicle emissions identified as the major source of pollutants.

1952 -Payne and Sigworth concluded that blowby was not a significant source of air pollutants.

1953 -Automobile manufacturers formed the "Vehicle Combustion Products Committee," under the auspices of the Automobile Manufacturers Association to study pollution. Air Pollution Foundation (APF) was founded.

1954 -APF conference held in August on automotive engineering design and exhaust control devices.

-Emergency grants awarded to the University of California and to the Public Health Department for accelerated research.

1955 -Automobile manufacturers signed a cross-licensing agreement for free access to any emissions control patent owned by member firms.

-Auto companies began work on a device to curb tailpipe hydrocarbon emissions by 30 to 50 percent.

-APF affirmed Haagen-Smit's findings and determined relative role of the refineries.

-APCD established its Automotive Combustion Laboratory

1956 -APF concluded that motor vehicles were the principle contributor to smog.

-APCD called a meeting of chemical and auto accessory firms to stimulate interest in the development of an emissions control device.

1957 -First catalytic converter prototypes were developed by Ford and GM. Auto industry presented the results of a three-year study on induction devices.

1959 -Engineers at GM found that blowby was a significant source of emissions.

-California legislature directed the Department of Health to adopt standards for community air quality, and in particular, for motor vehicles.

-Exhaust emissions standards were set by the Department of Public Health.

1960 -APF wrote that auto companies could have control devices to test within one year.

-GM developed crankcase device.

-*Motor Vehicle Pollution Control Act* established a Motor Vehicle Pollution Control Board (MVPCB) within the California Department of Health to certify control devices and require their use.

-Crankcase emissions standards set by the Department of Public Health.

-*Schenck Act* adopted in which Congress directed the Surgeon General to report on the effects of motor vehicle exhaust on human health.

1961 -Most American vehicle manufacturers voluntarily installed crankcase controls on vehicles marketed in California.

-MVPCB certified a GM crankcase device, which later proved to be defective.

-Secretary of Health, Education and Welfare (HEW) warned that if blowby devices were not placed on all cars, he would recommend that mandatory legislation be passed by Congress.

1962 -Up to 700 deaths were attributed to the "Killer Smog" which hit London in December.

-Several crankcase devices were certified. California legislature made improved crankcase devices mandatory on new American-made cars starting with the 1964 model year, and upon change of ownership within certain counties.

-*Air Pollution Control Act* is extended for two years. Studies called for in the Schenck Act are made a permanent task of the Surgeon General.

1963 -Most American vehicle manfuacturers voluntarily install crankcase devices nationwide.

Legislation and Regulation

-*Clean Air Act* , amending the Air Pollution Control Act of 1955, is adopted, directing the Department of HEW work with industry representatives on fuel and emissions technology, and to develop criteria on the effects of air pollution and its control.

1964 -In March, auto companies said there was no way that they could have a device ready until 1967. But, in August, after the certification of four devices by the MVPCB, the companies announced that they had engine modifications that were superior to the independant parts manufacturers.

1965 -Ralph Nader's *Unsafe at Any Speed* published.

-*Motor Vehicle Air Pollution Control Act* amended the Clean Air Act. Directed HEW to set emission standards for motor vehicles to become effective in 1968.

1966 -November inversion in New York City estimated to cause 80 deaths.

-All 1966 American-made cars sold in California required to have exhaust emissions controls and state legislation switches from a two- to one-device requirement.

-HEW set standards for motor vehicle emissions to become effective for the 1968 model year.

1967 -Inter-Industry Emission Control Program begun by Ford in conjunction with several oil companies and foreign manufacturers.

-MVPCB replaced by the Air Resources Board (ARB).

-*Air Quality Act* amended the Clean Air Act with provisions for assistance to states for vehicle inspection, registration of fuel additives and federally-designated air quality control regions, control criteria and suggested control techniques. Only California could establish new vehicle provisions more stringent than federal ones.

1968 -*Pure Air Act* included specific emission standards for HC, CO, and NOx for 1970 and 1972 models and provided that the ARB was to conduct assembly line testing. The ARB could make standards more stringent.

-1968 model cars subject to emissions standards set by HEW (based on California's 1967 standards).

-The National Center for Air Pollution Control, the Automobile Manufacturers Association, and the Petroleum Institute began a three-year, $10 million research program on air pollution (none of which were directed towards developing technologies to control or prevent emissions.

1969 -The anti-trust division of the U.S. Department of Justice brought suit against the manufacturers, charging them with collusion in delaying the development of emissions control technology. The suit was settled when the manufacturers agreed to end the cross-licensing agreement.

1970 -California legislation is passed which 1) creates a basinwide air pollution control coordinating councils, and 2)directs the ARB to study the costs and benefits of vehicle inspection.

-Clean Air Act Amendments set "technology-forcing" emission standards for automobiles for HC and CO by 1975 and for NOx by 1976. The National Academy of Sciences (NAS) was directed to study the technological feasibility of standards and deadlines and to submit semiannual reports for use in determining whether extensions would be granted.

1971 -California requires control of NOx on 1971 model automobiles and passes legislation requiring the ARB to set standards for NOx devices for 1966-71 models. U.S. EPA promulgated uniform national air quality standards and set emissions standards.

1972 -NAS released its first report.

1973 -EPA granted one-year delays for all standards.

1974 -The *Energy Supply and Environmental Coordination Act* delays standards a second year and gives EPA the power to delay all standards for a third year.

1975 -McJones discovers that disconnecting the spark advance greatly reduces NOx emissions.

-California alters requirement so that exhaust emissions controls are only required upon initial registration or transfer of ownership.

-EPA grants another year's delay of HC and CO standards because of a possible problem with the production of sulfates by catalysts.

1977 -Clean Air Act Amendments delay the 1970 emissions requirements until the early 1980s, set targets for trucks, set separate standards for vehicles at high altitudes, and required that these vehicles meet nationwide standards by 1984.

1990 -Clean Air Act Amendments set new emission standards for various pollutants and air toxics, evapo-

visions were written to prod auto companies into action, developing technologies that Congress was confident that they (or their suppliers) could produce. The deadlines written into the law were very ambitious, but the law also provided for an evaluation of the feasibility of achieving them on time. Despite this provision, short deadlines were included because there was a widespread perception that auto companies were simply resisting the development of new technologies. Congress was careful to not specify which technology was to be adopted by including only performance standards in the legislation. Unfortunately, Congress' "hands-off" approach to the choice of technology, combined with its strong push for rapid development, may have ultimately hindered widespread innovation and the development of radical improvements. In hindsight, it is possible to identify key technical, structural, and political considerations that contributed to the slow progress under the 1970 Clean Air Act. The following is a discussion of each of the three dimensions.

Under the 1990 Amendments, fuel oxygenation is required in the Durham, North Carolina area due to poor air quality.

Technical Considerations

The combination of short deadlines and the use of performance standards may have discouraged radical innovation. As a prescient engineer stated early in the saga of emissions control:

> Great care must be taken in developing intelligent legislation with respect to the car exhaust problem. The ultimate solution cannot be brought into being in the first stage of effort. Overrestrictive legislation could cause termination of the more imaginative and complex research approaches and thus delay greatly the optimum solution to this problem.[8]

William Abernathy, a scholar of the automotive industry, has raised other, related issues. He suggests that technology-forcing regulation may contain a paradox: "Regulation may encourage rapid incremental progress and, at the same time, 1) by diverting resources away from research into them ..., and 2) erecting barriers", hinder the development of more epochal innovations.[9]

The National Academy of Sciences Automobile Panel, in which Abernathy participated, argues that regulations interact with one another to reinforce the existing technology and that this interaction raises the cost of developing new technologies:

> As new requirements create new demands, R&D tasks associated with each change become more complex, costly, and subject to risks. Each change, too, becomes more costly while at the same time more changes are required .... In attempting to protect the innovative process by undertaking piecemeal regulations ... government agencies ... may have created a sequence of independent regulatory actions that, taken as a whole, form a tightening web of constraints that envelop the existing technology.[10]

Structural Considerations

The 1970 Clean Air Act did not consider the nature of the automobile industry or the automotive market. The

Act pushed auto manufacturers to innovate but ignored the role of the industry's suppliers. This group, historically a source of numerous inventions, is typically less able to weather the uncertainty and costs of changing requirements. The technology-forcing provisions were designed to push a deep-pocketed yet reluctant industry rather than to work with capital cycles, the market's price sensitivity, and other parameters.

The exclusive focus on the auto industry, combined with a reluctance to specify a preferred technology, also hindered the development of emissions technology. Ultimately, the development of the catalytic converter required inter-industry cooperation. Specifically, the use of unleaded fuel was required, and the development of microprocessors aided their effectiveness. However, because the 1970 Act was not written to promote a certain technology, it was also not written to martial the resources of different industries to its development.

Political Considerations

Emissions-control legislation presents a unique political challenge because of the enormous power of both the consumers, everyone who may buy a car in the future --most of the voting public--and the producers, the automobile industry. Although other factors besides technological improvement (for instance, a reduction in driving) could also contribute to clean air, the power of the voting public has limited this option. The mood of Congress is nicely summarized by Gary Bryner in his recent analysis of the 1990 Clean Air Act Amendments, *Blue Skies, Green Politics*:

> The battle between the auto industry and clean air advocates over the extent to which cleanup can be achieved through technological controls on tailpipe emissions has dominated the debate over clean air legislation .... Aware that technological changes are less difficult to bring about than changes in the driving habits of Americans, Congress has hesitated to impose aggressive transportation control measures.[11]

The power of the voting public is also reflected in the decision to require that any technology last for five years or 50,000 miles, and to not require as high a level of emissions reduction after this time. This provision was designed to keep the public from having to purchase replacement control equipment, and thus to keep the cost of the control equipment hidden in the sticker price of the car. It is possible that, if such durability had not been required, emissions control could have been implemented earlier.

The auto industry itself presents an unusual situation. As Douglas Ginsburg, a scholar of regulation, stated: "automobile regulation faces a special challenge...it applies to an industry that is at once highly concentrated and almost unimaginably large and important to the American economy."[12] Ginsburg explains that the small number of firms in the industry make it possible for firms to collude, and that it is in the government's interests not to cause further concentration of the industry.[13] The size of the industry lends it the political power that made sanctions in the 1970 Clean Air Act unfeasible:

> The government cannot credibly threaten to impose severe sanctions when the industry fails to meet a standard. To prohibit a single domestic firm from marketing nonconforming vehicles would (1) concentrate the market further in the remaining hands; and, if it is one of the big three firms, (2) have unacceptable consequences for the national economy. Therefore, the industry ... has a degree of immunity from prosecution. Since both the industry and the government know that the Draconian sanctions now provided by law cannot be used, the industry may be readier to resist regulation.[15]

The 1990 Clean Air Act Mandates

In contrast to the 1970 Act, the 1990 Act has detailed provisions covering many factors that contribute to emissions. These provisions cover inspection and maintenance, fuels, fueling, economic incentives for consumers such as congestion pricing, evaporation from the gas tank, measures to discourage single occupancy vehicles, and many other items.

The 1990 Act also specifies some of the technologies that are to be phased-in. A notable departure from the 1970 act is the use of pilot programs (California and also fleet vehicles in urban areas) for radically different automotive technologies, such as electric cars.

A short list of the provisions of the Act include:

1992 - Oxygenated fuels are required in areas which exceed the carbon monoxide standard.

1994 - Onboard diagnostic control devices to detect emission-related system malfunctions required on cars and light trucks.

1996 - Start of the California pilot program with the production of 150,000 clean-fueled vehicles annually, to be increased to 300,000 vehicles by 1999.

By 1998 - New emissions standards phased-in.

By 1998 - Canisters to absorb evaporative emissions phased-in.

1998 - The sale of very clean gasoline or alternative-fueled vehicles required in ozone or carbon monoxide nonattainment areas, if these vehicles have been developed for the California market.

Conclusion

Several key considerations for the success of innovation-promoting legislation were illustrated by this case study. These lessons can be widely applied--they are not simply restricted to environmental-protection technologies or to the automobile industry. They form a useful framework for the consideration of different policies of variousways to promote government and business interaction in the development of technology. These lessons may be relevant for situations which lend themselves to "command-and-control" legislation, as was applied in this case, or to incentive-based solutions:

·Policy makers may need to choose a particular technology or devise a program which blends the initial choice of a preferred technology with incentives for the development of more effective long-range solutions.[15]

·Policy makers need to be aware of an industry's structure and the behavior of its markets. Some industries are likely to be much more entrepreneurial because the industry is relatively new or new markets are developing for its products. Large, mature industries (such as the auto industry) however, may be much more resistant to innovation because of their level of investment in the status quo. Further, the most likely source of innovation may not be the manufacturer but the suppliers, who have less capacity to overcome cost barriers and uncertainty. Policies that provide profit opportunities will encourage interest in innovation.

·Some technologies require direct government involvement in the development of standards and the coordination of activities among different industries. In this case, a supply network for unleaded fuel was needed. If electric cars are promoted in the future, an entirely new supply network will need to be developed.

·Policy makers need to keep an eye on the political feasibility of provisions and enforcement measures. Provisions which ultimately lead to "show-downs" between the government and powerful interests can be counterproductive.CP

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Notes

[1]Gore, *Earth in the Balance*, p. xvi.

[2]Cairncross, *Costing the Earth*, p. 9.

[3]As the Supervisor of the Regional Air Pollution Control Agency (RAPCA) in Dayton, Ohio states: "Six out of every 10 people in the United States today live in an area which fails to meet air quality standards that have been set to protect human health." John A. Paul, "Urban Air Quality: The Problem," *EPA Journal*, January/February 1991, p. 24.

[4]Walsh, "Motor Vehicles and Fuels: The Problem," *EPA Journal*, January/February 1991, p. 12.

[5]A representative of the Automobile Manufacturer's Association stated in 1966 that flame and catalytic afterburners (i.e., catalytic converters) had "proved to be unfeasible." See the speech of B.W. Bogan, p. 81, in the *Proceedings* of the Third National Conference on Air Pollution.

[6]This is inferred from progress in the development of the catalytic converter in the early 1970's. See for instance the reference to "significant advancements" in the cover memorandum for *The Report by the Committee on Motor Vehicle Emissions.*

[7]Jacoby and Steinbruner, *Clearing the Air: Federal Policy on Automotive Emissions Control*, p. 1.

[8] Air Pollution Foundation, *Sixth Technical Report* (1960), p. 41.

[9]Abernathy, *Government, Technology, and the Future of the Automobile*, p. 46.

[10]Automobile Panel, Committee on Technology and International Economic and Trade Issues, *The Competitive Status of the Automobile Industry*, (1982), p. 87.

[11] Bryner, *Blue Skies, Green Politics: The Clean Air Act of 1990,* (1993), p. 132.

[12]Ginsburg, "Making Automobile Regulation Work: Policy Options and a Proposal," in *Government, Technology, and the Future of the Automobile*, p. 17.

[13]Ibid. p. 18.

[14] Ibid. pp. 18-19

[15]Some authors promote technology certification programs as a means to promote the early use of near-term technologies while also encouraging the long-range development of other technologies.

Federal Consistency and Dispute Resolution

Jessica Cogan
Mark T. Imperial

The 1970s marked a new era of environmental protection efforts in the United States. One major piece of legislation passed by Congress was the 1972 Coastal Zone Management Act (CZMA),[1] which established a program to provide for the wise use and protection of the nation's coastal resources. Issues such as the loss of coastal and marine resources and wildlife, decreased public space, multiple use conflicts, and shoreline erosion have been a focus of this legislation.

This article discusses the authority granted to state coastal zone management (CZM) programs pursuant to Section 307 of the CZMA. In particular, it focuses on the use of the federal consistency process as a tool for resolving intergovernmental disputes. In order to illustrate some of the issues surrounding the use of the federal consistency process, this article examines the legal questions surrounding a recent dispute which resulted in an appeal to the United States Secretary of Commerce by the Virginia Electric and Power Company (VEPCO). The Secretary's decision in this matter has important implications for a state CZM program's role in the federal consistency process.

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1972 CZMA

In 1972, Congress declared four national coastal management policies through the CZMA. These policies are: 1) to preserve, protect, develop, and where possible, to restore or enhance the resources of the coastal zone of the United States; 2) to encourage and assist the state to develop and implement coastal management programs which meet certain national standards; 3) to encourage the preparation of special area management plans to protect resources, ensure coastal dependent economic growth, and to protect life and property from natural disasters; and, 4) to encourage the participation and cooperation of the public, local and state government, and federal agencies.[2]

The CZMA established a voluntary federal grant-in-aid program which is administered by the National Oceanic and Atmospheric Administration (NOAA) in the Department of Commerce. In order to encourage state participation in the CZM program, two incentives were provided; funding and federal consistency. First, individual states were eligible for funding to plan and develop coastal resource management programs. Once approved, the state is then eligible for implementation funding. Second, and perhaps the most important, has been federal consistency. Federal consistency ensures that federal activities comply with approved state coastal management plans and has played an integral role in state program implementation.[3]

While there are many requirements which states must satisfy to receive program approval, the NOAA has historically granted a great deal of flexibility in the structure of these programs.[4] The CZMA contains only broad standards which allow states to develop management programs that address issues of state and local concern.[5] Some issues typically addressed in state programs include: minimizing coastal hazards; beach access; preserving coastal-dependent uses; redeveloping

urban waterfronts and ports; siting industrial and commercial facilities in the coastal zone; and clustering new coastal development.[6] To address these issues, states rely on a variety of implementation tools which include, but are not limited to, special area management planning, comprehensive planning, land acquisition and direct regulatory permitting.

Perhaps the most important means of program implementation has been the guarantee that once a state program is approved, federal agencies and permittees whose activities affect the coastal zone and its resources, will remain consistent with state policies. This concept extends far beyond the advisory reviews of federal actions established in 1969 under the National Environmental Policy Act (NEPA).[7] Essentially, federal consistency allows states to review certain federal actions to ensure that they are consistent with their approved CZM programs.[8]

The Federal Consistency Provisions

CZMA's federal consistency provisions allow states to review five categories of federal activities:

1) Federal agency activities (Section 307(c)(1))

2) Federal development projects in the coastal zone (Section 307(c)(2))

3) Federal license and permit activities (Section 307(c)(3)(A))

4) Federal license and permits for Outer Continental Shelf activities (Section 307(c)(3)(B))

5) Federal financial assistance (Section 307(d))

The regulations promulgated by NOAA require all federal agency activities that affect any land or water use or natural resource of the coastal zones be carried out in a manner which is consistent to the "maximum extent practicable" with state CZM programs.[9] Federal license and permit activities and federal financial assistance that affect any land or water uses or natural resources of the coastal zone or outer continental shelf must be conducted in a manner consistent with state CZM programs.[10] The standard "consistent to the maximum extent practicable" is defined in the NOAA's regulations to be fully consistent unless compliance is prohibited based upon the requirements of existing law governing the federal agency's operations. The standard "consistent" with the approved state CZM program means fully consistent. However, the Secretary of Commerce (hereafter referred to as the Secretary) can override a state response and allow the federal financial assistance, licenses, or permits to be issued if he finds that the action is consistent with the objectives of the CZMA or is necessary in the interests of national security.[11]

The CZMA declares that there is a national interest in the effective management, beneficial use, protection, and development of the coastal zone.[12] Two specific national interests have been identified: energy development and national defense. The Secretary reviews and approves state programs, and has the responsibility of ensuring that state programs adequately address these national interests. Accordingly, the Secretary has the power to deny approval of state programs if they fail to adequately recognize these national interests.[13]

The Federal Consistency Process

Just as there are two standards for federal consistency, there are two federal consistency processes: one for federal activities and development projects and one for federal license and permit activities.[14] These two processes give different roles and authority to the state agencies and have distinct dispute resolution processes.

In the first consistency review procedure, the federal agency reviews proposed activities in order to determine if the activity will affect the land or water use or natural resources of the coastal zone. To facilitate this process, a state CZM program, in consultation with federal agencies, can develop lists of federal activities that will affect its coastal zone. If the federal agency determines that the activity will affect the state's coastal zone or it is a listed activity, then the federal agency must provide the state with a consistency determination that includes a detailed description of the activity and its likely affects on the coastal zone.[15]

The state agency has 45 days to respond to this consistency determination or its concurrence is presumed.[16] If the state agency disagrees with the federal agency's consistency determination, the state agency must describe how the proposed activity is inconsistent with the enforceable elements of the state's approved CZM program and provide alternative measures (if any) that would make the activity consistent.[17] In the event of a serious disagreement between the state agency and a federal agency regarding the consistency determination, either party can request mediation by the Secretary.[18]

The second consistency review process is for federal license and permit activities that affect a state's land or water use or natural resources of the coastal zone. Included in each state CZM program is a list of federal license and permit activities which are likely to affect a state's coastal zone. When a state agency chooses to review federal licenses and permits for potentially impacting activities outside of the coastal zone, it must describe the general geographic location of such activities.[19] Applicants for federal licenses and permits subject to the state CZM program's listing requirements must submit a consistency certification to the state CZM program. This certification must describe the proposed

activity in detail, its probable coastal zone effects, and include a set of findings indicating how the proposed activity is consistent with the enforceable elements of a state CZM program.[20] States may also monitor unlisted federal license and permit activities using the Executive Order 12372 intergovernmental review process, and request consistency certifications for these.[21]

The state agency has six months to respond to the consistency certification or concurrence is presumed. If the state agency concurs, then the federal agency may issue the permit.[22] If the state agency objects, it must then describe why the proposed activity is inconsistent and describe alternative measures (if any) that would permit the activity to be carried out in a manner consistent with the state CZM program. As a result, the federal agency may not issue the license or permit until the state coastal zone management program concurs.[23] Should a dispute arise, the applicant may appeal to the Secretary or appeal in court.

The distinction between the two federal consistency review processes is important. First, the standard for federal activities, " consistent to the maximum extent practicable", is less than that for federal license and permit activities, "consistent." Second, while an objection to an applicant's consistency certification for a federal license or permit serves as a veto of that activity, a state objection to a federal activity or development project does not enjoin the federal government from acting. The federal agency may proceed if it disagrees with the state's determination unless a court determines otherwise. Third, the burdens of proof are different. For federal agency activities, the state must demonstrate either the need for a consistency determination or the inconsistency of the proposed action. For federal license and permit activities, it is the applicant who bears the burden of proof in a legal challenge or an appeal to the Secretary. Fourth, mediation is the only administrative mechanism available to resolve disputes over federal agency activities and development projects while a formal mechanism for appealing decisions to the Secretary of Commerce is available for federal license and permit activities. Accordingly, the differences between the two consistency review processes influence the nature of the disputes that emerge.

Resolving Intergovernmental Conflicts

One of the keys to effectively managing coastal resources is intergovernmental coordination. The federal consistency provisions provide an important mechanism to coordinate federal agency activities with state implementation of approved state CZM programs. Because it was inevitable that disputes would arise in the administration of Section 307, Congress included two administrative mechanisms in the CZMA for resolving disputes: mediation and appeal to the Secretary.

Mediation

Mediation by the Secretary may be requested by either the federal or state agency when there is a serious disagreement concerning the administration of an approved state CZM program. The mediation procedures are entirely voluntary and end as soon as either party decides it no longer wishes to participate.[24] In general, the formal mediation procedures have been used infrequently since the federal agency often refuses to participate. Informal mediation has been more successful and states frequently resolve disputes with federal agencies through informal negotiations.[25]

Appeal to the Secretary of Commerce

The CZMA also provides for appeals to the Secretary to resolve disputes between applicants for federal license and permits that result from a state's objection to a federal consistency certification. The Secretary may override a state objection if he finds that the activity is necessary in the interests of national security or if he finds the activity to be consistent with the state program and the objectives of the CZMA.[26]

To override on national security grounds, the Secretary must find that the activity is permissible because a national defense or national security interest would be significantly impaired if the activity was not permitted.[27] In order to override a state's objection and determine that the proposed activity is consistent with the objectives and purposes of the Act, the Secretary must determine that the proposed activity meets the following requirements: 1) the activity must fulfill a national objective listed in Section 302 and 303 of the CZMA; 2) the activity must not cause adverse impacts on the natural resources of the coastal zone substantial enough to outweigh its contributions to national interests; 3) the project must not violate the Clean Water Act or the Clean Air Act; and, 4) there must be no reasonable alternatives for conducting the activity.[28]

The first state CZM program was approved in 1976 and by the end of 1990, the Secretary had issued fifteen written decisions. Of the fifteen decisions, seven of these upheld the state's objections and none overode a state's objection on the grounds of national security. Most significant is that a state's objection has not been overturned if the state has provided reasonable alternatives. One product of the increasing number of written decisions is that a constantly expanding base of precedence is emerging that influences the future decisions of the Secretary during appeals.[29]

In general, the appeals process has been a success.[30] Many disputes were resolved without the Secretary having to issue a written decision. For example, from 1976 to 1987, twenty-two appeals had been filed with the Secretary. During this period only six written decisions were issued, five were stayed pending further negotiations, six

were withdrawn by mutual consent, two were dismissed on procedural grounds and three were pending review.[31] Another indicator of the success of the appeal process is that the number of appeals has steadily been increasing. This indicates that potentially-affected parties are increasingly relying on this administrative process instead of judicial remedies. It also indicates that state CZM programs are using the federal consistency process as a tool to ensure intergovernmental coordination. The expanding use of this dispute resolution process can be attributed to the maturation of the appeals process and its past success in resolving conflicts. The appeal to the Secretary between South Carolina and Georgia illustrates the complexity of the issues raised in the appeals process and the important precedent this can establish.

One issue surrounding the use of the federal consistency provisions is whether a state CZM program has the authority to review a federal license and permit activity that affects its coastal zone even if the activity takes place entirely within another state's jurisdiction. This legal question was at the center of a dispute concerning an appeal to the Secretary by L.J. Hooker Development, a Georgia-based land development company. It was also the central issue of the appeal to the Secretary by VEPCO.

Appeal to the Secretary of Commerce By L.J. Hooker Development

In 1988, L. J. Hooker Development applied for a dredge and fill permit from the U.S. Army Corps of Engineers (COE) to develop an area on Hutchinson Island in Georgia just across the Savannah River from South Carolina. On May 24, 1988, the South Carolina Coastal Council (SCCC) received notice from the Savannah District of the COE that it was undertaking a review of Hooker's application. The SCCC told the Corps that the project would have both direct and significant impacts on South Carolina's coastal zone and would have unacceptable water quality impacts. On October 18, 1988, the SCCC found that the project was inconsistent with the South Carolina Coastal Management Program (SCCMP).[32] In addition, the U.S. Fish and Wildlife Service (USFWS), the National Marine Fisheries Service (NMFS), and the Environmental Protection Agency (EPA) all objected to the project.

Hooker appealed South Carolina's inconsistency ruling to the Secretary on November 18, 1988. On March 28, 1989, Hooker withdrew the consistency appeal because the project was addressing some of the impacts with which South Carolina was concerned. South Carolina, in turn, dropped all but one of its objections.

This controversy involved several federal agencies, the States of South Carolina and Georgia, and a private developer. South Carolina and NOAA both argued that the federal consistency provisions, the legislative history, and NOAA's regulatory rulemaking all support the position that a state may review a project regardless of its location even if it is entirely outside of the coastal zone and is located within another state's jurisdiction. They argued that the threshold inquiry is merely whether the activity affects land or water uses or natural resources in the state coastal zone. Hooker, Georgia officials, the United States Justice Department (USDOJ) and the Army Corps of Engineers argued that the 1984 Supreme Court ruling in *Secretary of Interior v. California* sets precedent for denying South Carolina the right to review this project.[33]

Even though the appeal was dropped, this controversy highlighted two major legal questions concerning the use of the federal consistency provisions. The first is whether an approved state CZM program is entitled to review federal license and permit activities which occur outside of its coastal zone. And the second is whether a state has the authority to review federal license and permit activities outside of its coastal zone if the activity occurs entirely within another state's boundaries.[34] As a result of this dispute, NOAA's General Council issued a written opinion which addressed these issues. This opinion concluded that approved state CZM programs could review federal license and permit activities located outside of its coastal zone even if they are located entirely within another state's boundaries provided that the activities affects a land or water use or natural resources of a state's coastal zone.[35] However, since South Carolina withdrew its objections, these issues remained unresolved and subsequently formed the basis for the dispute which resulted in VEPCO's appeal to the Secretary.

Appeal to the Secretary of Commerce by the Virginia Electric and Power Co. (VEPCO) from an Objection by the State of North Carolina

In 1986, VEPCO and the City of Virginia Beach, Virginia developed a proposal to the Federal Energy Regulatory Commission (FERC) to construct, operate, and maintain a municipal water supply project and withdraw up to 60 million gallons of water per day from Lake Gaston.[36] Lake Gaston bisects the North Carolina-Virginia border and is a dammed portion of the Roanoke River which flows from Virginia into North Carolina's coastal zone. The consumptive withdrawal would be made by and for the benefit of Virginia Beach. The entire project as proposed will consist of certain easements and facilities to be constructed entirely within the boundaries of the Commonwealth of Virginia.[37] In view of the potential impacts, North Carolina requested and received a consistency certification. After a review of the proposed FERC permit amendment, North Carolina objected to the water withdrawal because of its

Virginia Beach's rapid growth has significantly increased the the area's water supply requirements.

downstream effects on important fisheries, wetlands, and the hydrology of the Roanoke River and Albermarle Sound.[38]

Based on North Carolina's objection, VEPCO filed an appeal with the Secretary. On December 3, 1992, based on a March 12, 1992 legal opinion issued by the USDOJ, the Secretary terminated the appeal. In reaching its decision the Secretary ruled that: 1) the project as proposed takes place entirely within the borders of Virginia; and 2) North Carolina was without jurisdiction because the CZMA does not allow states to review projects located wholly within another state.[39] In early 1993, NOAA asked the USDOJ to reconsider its decision. USDOJ rejected this request and stood by its opinion. North Carolina has decided that it will judicially appeal the Secretary's decision. This litigation will focus on the opinion of the USDOJ and the earlier opinion of NOAA's General Counsel.

The Opinion of the Department of Justice

USDOJ based its opinion on both the statutory construction of the CZMA and its legislative history. USDOJ argued that the legislative history indicates that the focus of Section 307 (c)(3)(A) was to entitle states to review federal license and permit activities located "in" the coastal zone and that neither the statute nor the legislative history discuss potential interstate conflicts. This silence is in stark contrast to the elaborate mechanisms created to resolve interstate conflicts in other federal-state cooperative programs.[40]

One relevant example that USDOJ cited is Section 401 of the Clean Water Act (CWA) as amended. Section 401 of the CWA creates a similar consistency review process in that all applicants for activities requiring federal licenses and permits that result in a discharge of pollutants into the waters of the U.S. must obtain a certificate from the state where the discharge is located which certifies that the discharge meets the state's water quality standards. If the Administrator of EPA determines that the discharge may affect the waters of another state, that state is notified and may object on the grounds that its water quality regulations will be violated. Because there was no recognition of interstate conflicts and no directive to the federal executive to resolve conflicts between states, USDOJ argued that there was clearly no Congressional intent to expand the Section 307 authority beyond the boundaries of one state. As further evidence of the statute's limitations to federal consistency review within state boundaries, USDOJ pointed out that the CZMA always refers to state in the singular and not in the plural.

In its opinion, USDOJ also relied on the legislative history of the 1990 federal consistency amendments, pointing out that the legislative history contains proposed amendments which would have broadened the mediation authority to include the mediation of disputes between states.[41] Because these provisions failed to become law, USDOJ argued that Congress was apparently unwilling to involve the Secretary even in the

mediation of interstate disputes.

Finally, in support of its opinion, USDOJ relied on the following statement from the conference report on the federal consistency amendments:

> [N]one of the changes made to section 307 (c)(3)(A)(B), and (d) change existing law to allow a state to expand the scope of its consistency review authority. Specifically, these changes do not affect or modify existing law or enlarge the scope of consistency review authority ... with respect to the proposed project to divert water from Lake Gaston to the City of Virginia Beach, Virginia.[42]

While this does not state that North Carolina cannot review the activity, it appears to indicate that Congress did not believe that federal consistency authority spanned state boundaries. The interpretation of this paragraph will be at the heart of North Carolina's legal challenge as will the legislative history of the CZMA.

The Opinion of NOAA's General Counsel

The Secretary's decision to defer to the Department of Justice opinion and dismiss North Carolina's objections contradicts NOAA's General Council opinion issued as a result of the Hooker appeal. In this opinion, NOAA relies on the legislative history of the CZMA as well as its prior rulemaking activities and past administration of Section 307 (c)(3)(A). NOAA argues that it has consistently interpreted Section 307 (c)(3)(A) as applying to activities landward or seaward of the coastal zone. As a result, the threshold for review used by NOAA has always been the effect of an activity on the land and water uses of the coastal zone and not the location of the activity. NOAA arguments also rely heavily on its past rulemaking activities that permit a state to review activities located outside of its coastal zone as long as the general geographic area where the state wishes to review activities is described in its approved program. These regulations also permit a state to review federal license and permit activities even if the activity occurs entirely within another state's borders.[43]

To further support its arguments, the NOAA opinion refers to numerous instances where it has already permitted states to review federal license and permits activities located outside of the state's coastal zone. These examples may include several activities located entirely within another state. Examples cited include: South Carolina's review of a coal port in Georgia; Maryland's review of the Chem Waste research burn; a marina project located in New York but landward of the coastal zone; and NOAA's acceptance of Massachusetts's review of a sewage treatment plant located in Seabrook, New Hampshire.[44]

Because NOAA has long interpreted and administered the federal consistency provisions in a manner which permits interstate consistency reviews, its General Counsel opinion relies heavily on arguments related to the degree of deference that should be accorded to an agency's interpretation of its statute. The NOAA opinion argues that past legal decisions support its contention that it has reasonably interpreted its statute.

The final issue that NOAA's General Counsel raises to support its argument is that the CZMA does have provisions to administratively address interstate consistency conflicts. Secretarial mediation pursuant to Section 307 (h) and appeals to the Secretary of Commerce pursuant to Sections 307 (c)(3) and (d) can be used to resolve interstate consistency disputes. NOAA points out that the federal consistency process in no way serves as a control over another state's land use. Moreover, the sovereign rights of a non-objecting state are not lessened by a neighboring state. The non-objecting state is in no way enjoined from issuing any state or local permit as a result of an adverse federal consistency decision. Rather the objection is directed to the federal licensing or permitting authority and thus the actual location of the project is irrelevant. In other words, interstate consistency reviews do not impinge another state's land use regulation. This position is further supported by NOAA's own regulations which require other federal agencies to consider the policies contained in approved state CZM programs as supplemental requirements to be used by the federal agency in making its license and permit decisions.[45]

Summary and Conclusions

The VEPCO dispute raises several legal issues which will be subject to further litigation. First, the courts will have to decipher the contradictions in the legislative history. Congress stated that these amendments were designed to maintain the status quo and the NOAA's present administration of the CZMA allows interstate federal consistency reviews. However, Congress also indicated that it did not believe interstate federal consistency review to be lawful. Second, if interstate consistency reviews are not permitted, what are the geographic limitations? For example, if a state is not entitled to review federal license and permit activities which take place outside of its state jurisdiction, can it review activities located beyond the limits of the state territorial sea (normally three miles) or inland of its coastal zone? Third, do interstate federal consistency reviews intrude on state sovereignty over land use issues? Fourth, are the mediation procedures and Secretarial appeals process sufficient to resolve interstate disputes? Finally, has the NOAA correctly interpreted and administered Section 307 (c)(3) and (d) in the past?

The resolution of these issues will have a profound impact on the use of the federal consistency provisions. Unless a court reverses the Secretary's decision, the new

limitations imposed on state CZM programs will curtail each state's use of the federal consistency provisions. In particular, federal consistency can no longer be used as a means of resolving interstate disputes. Ultimately, amendments to Section 307 of the CZMA may be required to ensure that state CZM programs regain the authority lost as a result of the VEPCO decision. This authority is the only means of ensuring that all federal license and permit activities that affect any land or water use or natural resource of a state's coastal zone are consistent with the enforceable policies of that program. If state CZM programs do not regain this authority, the long standing incentive for participation in the federal coastal zone management program will be severely weakened.CP

Notes

[1]16 USCS Ch. 33 § 1451-1464

[2]16 USCS Ch. 33 § 1452

[3]National Oceanic and Atmospheric Administration. 1988. "Coastal-Management: Solutions to Our Nation's Coastal Problems." U.S. Commerce. *Technical Assistance Bulletin No. 101*. December, 1988.

[4]Matuszeski, William. 1985. "Managing the Federal Coastal Program: The Planning Years." *APA Journal*. Summer 1985. pp. 266-274.

[5]Lowry, Kem. 1985. "Assessing the Implementation of Federal Coastal Policy." *APA Journal*. Summer 1985. pp.288-298.

[6]Archer, Jack H. 1988. *Coastal Management in the United States: A Selective Review and Summary*. International Coastal Resources Management Project. Coastal Resources Center. University of Rhode Island.

[7]Dean, Lillian F. 1979. "Planning for Environmental Management: New Directions and Initiatives." *Coastal Zone Management Journal*. Vol. 5, No. 4, pp. 285-306.

[8]Center for Urban and Regional Studies of the Department of City and Regional Planning. 1991. *Evaluation of the National Coastal Zone Management Program*. University of North Carolina at Chapel Hill.

[9]16 USCS § 1456 (c)(1)(A).

[10]16 USCS 1456 (c)(3)(A) and (d).

[11]15 CFR Ch. IX (1-1-90) Edition) § 930.120.

[12]16 USCS § 1451

[13]Archer, Jack H. and Robert W. Knecht. 1987. "The U.S. National Coastal Zone Management Program - Problems and Opportunities in the Next Phase." *Coastal Management*. Vol. 15. pp. 103-120.

[14]It should be noted that federal financial assistance is reviewed through the Executive Order 12372 "Intergovernmental Review of Federal Programs." Its provisions are similar to those governing federal license and permit activities.

[15]15 CFR Ch. IX (1-1-90 Edition) §930.39.

[16]15 CFR Ch. IX (1-1-90 Edition § 930.41.

[17]15 CFR Ch. IX (1-1-90 Edition) § 930.42

[18]15 CFR Ch. IX (1-1-90 Edition) § 930.36 and 15 CFR Ch. IX (1-1-90 Edition) § 930.43.

[19]15 CFR. Ch. IX (1-1-90 Edition) § 930.53.

[20]15 CFR Ch. IX (1-1-90 Edition) § 930.58.

[21]15 CFR Ch. IX (1-1-90 Edition) § 930.54

[22]15 CFR Ch. IX (1-1-90 Edition) § 930.63.

[23]15 CFR Ch. IX (1-1-90 Edition) § 930.63.

[24]15 CFR Ch. IX (1-1-90 Edition) § 930.36 anf 15 CFR Ch. IX (1-1-90 Edition) § 930.43.

[25]Eichenberg, Tim and Jack Archer, 1987. "The Federal Consistency Doctrine: Coastal Zone Management and New Federalism." *Ecology Law Quarterly* 14:33.

[26]16 USCS§ 1456 (c)(3)(A); 16 USCS § (c)(3)(B); 16 USCS § 1456 (d); and 15 CFR Ch. IX (1-1-90 Edition) § 930.120.

[27]15 CFR Ch. IX (1-1-90 Edition) § 930.122.

[28]15 CFR Ch. IX (1-1-90 Edition) § 930.121.

[29]Saurenman, John A. and Katherine A. Pease, 1991. "CZMA Consistency Opinions: An Undiscovered Body of Law," in *Coastal Zone '91*, Proceedings of the Seventh Symposium on Coastal and Ocean Management (New York, NY: American Society of Civil Engineers).

[30]For conflicting interpretations of appeal process (and the federal consistency process in general) see: Scott C. Whitney, George R. Johnson, Jr., and Steven R. Perles, "State Implementation of the Coastal Zone Management Consistency Provisions: Ultra Vires or Unconstitutional," *Harvard Environmental Law Review 12* (1988): 67; and Jack Archer and Joan Bondareff, "Implementation of the Federal Consistency Doctrine-Lawful and Constitutional: A Response to Whitney, Johnson & Perles," *Harvard Environmental Law Review 12*(1988): 115.

[31]Eichenberg and Archer, "The Federal Consistency Doctrine," 34.

[32]Jack Archer and Tim Eichenberg, "State Review of Federally Permitted Activities Outside the Coastal Zone: NOAA Takes on the Corps," in *Territorial Sea: Legal Developments in the Management of Ocean and Coastal Resources*, 9 (no. 1, Spring 1989): 13-15.

[33]Ibid.,13.

[34]Ibid., 15.

[35]Opinion Dated May 2, 1989 by Timothy R. E. Keeney, General Counsel, National Oceanic and Atmospheric Administration (Hereafter NOAA GC Opinion, May 2, 1989).

[36]North Carolina's first attempt to review this proposal was in 1986 when it asked to review a decision by the Army Corps of ENgineers to issue permits to Virginia Beach, VA under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. North Carolina subsequently withdrew its request after a settlement was reached. (See *North Carolina v. Hudson* 665 F. Supp. 428).

[37]Letter from Barbara Hackman Franklin, Secretary of Commerce to Alan S. Hirsch, Special Deputy Attorney General, North Carolina Department of Justice dated December 3, 1992.

[38]Ibid.

[39]Ibid.

[40]Letter from Barry M. Hartman, acting Assistant Attorney General, Environment and Natural Resources Division, US Department of Justice to Thomas A. Campbell, General Counsel, NOAA dated March 12, 1992 (hereafter cited as *Justice Opinion* March 12, 1992).

[41]HR. REP. No. 101-535, 101st Congr.,2d Sess., at 23 (1990).

[42]HR CONF. REP. No. 101-964, 101st Cong., 2d Sess., at 972 (1990).

[43]NOAA GC Opinion, May 2, 1989, at 7, 9 and 11.

[44]NOAA GC Opinion, May 2, 1989, at 13.

[45]NOAA GC Opinion, May 2, 1989, at 18.

Reauthorization of the Clean Water Act

The Dawn of Environmental Legislation under the Clinton Administration

Craig A. Bromby

An examination of the apparent leading bill before the United States Senate to reauthorize the Clean Water Act, entitled the "Water Pollution Prevention and Control Act of 1993", or Senate Bill 1114 (herein referred to as "S. 1114" or the "Bill"), reveals legislation consistent with many of the provisions of the Clean Air Act Amendments of 1990. The Clean Air Act Amendments appear to be viewed, at least by the authors of S. 1114, Senators Baucus (D-MT) and Chafee (R-RI), as a precedent for a number of approaches to environmental legislation. These precedents include an extremely detailed permitting program, concentration on the elimination of toxic constituents of discharges or emissions, pollution prevention, and a schedule of permit fees intended to shift the burden of funding the regulatory program to the regulated community and away from the taxpayer.

S. 1114 would impose on dischargers to surface waters (and indirect dischargers to publicly owned treatment works) many requirements to which permittees under the National Pollutant Discharge Elimination System (NPDES), established in the Federal Water Pollution Control Act amendments of 1972, were never subject. These new-generation regulatory devices include provisions for forcing technological advance in wastewater treatment without necessarily considering the economic impact on the industry, and prohibiting the use of certain substances in an industry's processes, irrespective of the industry's ability to treat and remove the substances from its effluent. There is a great deal of emphasis, directly or indirectly, on pollution prevention or source reduction of pollutants. Such an emphasis has led to the perception in the regulated community that this bill is far more intrusive into business decisions and process than its regulatory forebears.

The Clean Air Act Amendments were a radical departure from the traditional means of industrial pollution control. Many of its more controversial provisions are now being tried out in S. 1114, for water, the other principal environmental medium for waste transport.

What are the provisions which have regulated community observers standing up to take notice? This piece selects and summarizes several of the components of S. 1114 which would be sweeping in their effect on regulated industries. It proceeds through S. 1114, describes some of those sections which will have an significant effect on regulated industries, and explains the impact of the selected provisions.

Section 201

Technology-based controls for point sources: Since 1972, federal clean water legislation has been technology-forcing. For example, the Clean Water Act has required the Environmental Protection Adminstration's (EPA) adminstrator to determine for categories of industries the Best Available Technology (BAT) economically achievable to treat wastewater discharged by plants within the industrial category. EPA has promulgated these technology-based effluent guidelines by examining wastewater treatment technology in use in the better-performing plants within the industry, and determining how much pollution would be expected on a production-unit basis if that technology were used. For instance, an industrial BAT guideline might be expressed as 5.0 pounds of a pollutant for each 10,000 "widgets" produced. If a lesser performer in the industrial category

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were discharging 7.0 pounds of the pollutant for each 10,000 widgets it produced, it would be required, by a statutorily-imposed date, to improve its wastewater treatment to achieve 5.0 pounds/10,000 widgets by retrofitting the appropriate technology. In making its determinations, EPA was required to assess the economic effects of compelling the technological advance, and would not, for instance, use as the basis of BAT a cutting edge technology which was in use only in pilot scale and had not yet been installed in a competitive plant. Other technology-forcing provisions applied to the effluent standards for new sources. In promulgating these standards, EPA assumed that incorporating into the design of new plants state-of-the-art technology was more reasonable than attempting to impose that technology on older, existing plants. Another type of technology-based limitation was the "pretreatment standard", which required indirect dischargers to meet certain technological wastewater treatment minimums before they sent their wastewater to publicly-owned treatment works (POTWs) for treatment prior to discharge to the surface waters. There were pretreatment standards promulgated for existing sources and new sources.

Section 201 of the bill directs the EPA to issue regulations, "effluent guidelines", and "pretreatment standards", specifying "best available technology economically achievable". The proposed amendments would further ratchet down technology-based controls by requiring EPA to establish effluent guidelines, new source performance standards, and pretreatment standards that:

- reflect source-reduction techniques, including changes in production processes, products, and raw materials that reduce, avoid, or eliminate the generation of toxic and hazardous byproducts;
- require elimination of discharges where technologically and economically feasible;
- require elimination of releases to other media, where technologically and economically feasible; and
- prohibit use of technologies that EPA determines will have an unacceptable adverse impact on other environmental media, such as groundwater.

It should be noted that, in determining technological and economic achievability, the EPA may consider such factors as costs of achieving the limitation or prohibition, age of equipment and facilities involved, processes employed, and engineering aspects of the application of control techniques and process changes, but it is not required. Under the present Clean Water Act, and its predecessors, consideration of these factors were mandatory. Also deleted by S. 1114 is the requirement that EPA consider non-water quality impacts (including energy impacts) of technology-based requirements.

Finally, S. 1114, using a concept borrowed from the Clean Air Act Amendments of 1990, requires EPA to assess fees on direct and indirect (those pretreating prior to discharge to a POTW) dischargers fees to offset the cost of development of effluent guidelines and pretreatment standards. Dischargers would be assessed a "proportional share" of the estimated cost. The basis for determining individual proportions is not dictated but promises to be among the more vigorously contested rulemaking exercises the EPA and states might face in implementing the provisions of S. 1114.

Section 202

Sediment standards, antidegradation, and mixing zones: The Clean Water Act imposed on dischargers certain technology-based effluent limitations and standards through the device of the NPDES permit. It also required states to adopt instream water quality standards for all surface waters. Each state had to inventory all its surface water bodies, determine the best uses of the water, and classify the waterbody accordingly. The minimal criterion for waters was that the quality in the stream had to protect aquatic life. That is, even if the present quality made the stream unfit for a balanced, indigenous population of aquatic organisms, it had to be classified for that use nevertheless. Most states determined several classes of waters ranging, for instance, from a default class to a class with quality high enough to be used for drinking water supply and body-contact recreation. In North Carolina, this is Class "C", with the uses of aquatic life propagation and survival, fishing, wildlife, secondary recreation, and agriculture. The water quality standards were designed to protect and enhance the classified uses of the waterbodies. So, for instance, the quality standards applicable to a drinking-water supply would differ somewhat from a default-class stream which was not expected to be used as a source of drinking water or a swamp, which would not, for natural reasons, have among its "uses" drinking water.

Once a state adopted water-quality classifications and standards, they were submitted to the Administrator of EPA. The Administrator reviewed the submittal to determine whether the state's proposal satisfied the objectives of the Clean Water Act. If it did not, the Administrator would object and the state would have a certain period of time to respond with revised classifications or standards. If the response was not forthcoming or insufficient, the Administrator was empowered to adopt standards and classifications for the state.

S. 1114 makes instream "uses", previously designated by states for their waters, automatically applicable to sediments, which were not covered by the original Act. Obviously, some pollutants will migrate directly to sediments and can have a significant impact on the aquatic organisms who dwell or feed in the sediments. The more

difficult concept is determining the uses of sediment beyond habitat or feedstock for aquatic organisms. Section 202 further authorizes the EPA to establish criteria for sediment quality and specifies that those criteria (as well as a host of other criteria for protection of ground waters, habitat, lakes, and other specific values) shall automatically become applicable nationwide upon their adoption, unless a state objects within 120 days.

The EPA also requires that states adopt "antidegradation statements." These "statements" are regulations limiting or prohibiting the degradation, by permitted discharges, of streams which have a higher water quality than the standards set by the classifications applied to streams. The bill also includes a stringent "anti-degradation" provision that, while similar in some respects to EPA's existing antidegradation rule, goes much farther. Specifically, the amendment would (1) apply antidegradation restrictions to both water and sediments, and (2) require states to designate a broad range of waters as "outstanding national resource waters" (ONRWs), for which no degradation of any kind would be permitted.

Equally important, the bill requires the EPA to issue a mixing-zone policy that, at a minimum, prohibits mixing zones in ONRWs. The policy must prohibit acute toxicity at any point in the zone, require any allowed area of dilution to be in a shape that facilitates monitoring, and require that the zone be calculated on an assumption of minimum stream flow. States would be required to adopt a mixing zone policy no less stringent than the national policy.

Section 203

Toxic pollutant phase-out: Toxic pollutants have been handled in a number of ways under the existing Clean Water Act. One provision allows the EPA to adopt toxic effluent standards, which may set an absolute limit on the amount of a particular toxic pollutant that can be discharged to a stream without regard to treatment technology, production, industry-type, etc. Very few of these standards have been adopted, and most pertain to persistent pesticides, which are no longer commonly used for agricultural purposes. More commonly, an effluent guideline, a BAT guideline, a new source performance standard, or other technology-based limitation, is developed to address the treatment of toxic substances discharges by a particular industry. States have also promulgated water quality standards for toxic substances. Water quality standards form a baseline for any permitted discharge to a waterbody. If a plant discharging a certain mass or concentration of a toxic substance in compliance with the BAT guideline would nevertheless result in an instream concentration of the substance in excess of the water quality standard, the discharger would be limited to the amount of the substance that could be assimilated by the stream and still stay within the water quality standard. This is known as a "water quality limited" permit.

Section 203 would require the EPA to publish a list of highly toxic, or toxic and highly bioaccumulative pollutants that occur in surface waters predominantly as a result of discharges. Discharge of listed pollutants would then be prohibited within one year of publication of the list. Certain provisions for exemptions by source category and extension of compliance periods are provided. Regulation of this type--absolute prohibitions, irrespective of technology and economics--has heretofore been eschewed by Congress. The proposal to abandon that approach is one reason why this provision is extremely controversial. Some view this means of the otherwise more benign concept of pollution prevention as unacceptably draconian.

Section 204

Pretreatment programs: The most significant portion of this provision is a proposal to eliminate the domestic sewage exclusion under the Resource Conservation and Recovery Act (RCRA). The pollutant and source contributing solid and dissolved material in domestic sewage must be in compliance with a pretreatment standard or local limit. For areas where none exists, the EPA has begun the process of developing a pretreatment standard; the solid or dissolved material will be considered to be a solid waste subject to regulation under RCRA.

Section 205

Pollution prevention: This provision requires the EPA to identify no fewer than twenty pollutants for which discharge reductions would benefit human health and the environment. Dischargers of these pollutants would be required to submit pollution-prevention plans designed to reduce direct and indirect discharges of these and other pollutants. Plans would have to establish goals, address water-use efficiency, and include onsite plans for goal attainment. Annual reports would be required. These, together with the pollution prevention plans prepared pursuant to this provision, would be publicly available. The reports required under the Emergency Planning and Community Right to Know Act, recording the total hazardous pollutant "releases" from a facility, have resulted in headlines about the "dirtiest" industrial facilities that would make any public relations officer quiver. This is another example of a publicly available report that could be used to the detriment of a plant's public image. One criticism of this provision is that it may punish those facilities which have done the most to achieve pollutant reductions voluntarily because they may already have done most of what is technologically possible to reduce pollutants in their plants. Thus, their plans may look less aggressive and their goals appear comparatively modest.

Section 302

Comprehensive watershed management: This provision establishes a voluntary, comprehensive program of watershed management. While it has many positive features, this section enables the Clean Water Act to begin to intrude in local land use planning. The provision is not mandatory on the states. There are, however, incentives for participation by states and once the threshold is crossed, each state will have to take certain actions to implement the management program--actions which inescapably take on a degree of federal control or, at the very least, influence. Having crossed this particular Rubicon, the participating state will have engaged, on some scale, in a form of statewide land use controls.

The impact on North Carolina is unclear, however, as much has already been done to address watershed management. For example, rules are already in place concerning water supply watersheds. The General Assembly directed the Environmental Management Commission (EMC) to embark on a statewide program of water supply watershed management and protection by, among other things, controlling development density or implementing performance-based controls on stormwater runoff as alternatives to development density controls or some combination of both. Interestingly, the provision expressly identifying development density controls as a tool for watershed protection was quietly added as an amendment to the law in the 1992 session. The law previously required "protection of surface water supplies through minimum performance-based water-supply watershed management requirements." By adding express references to development density controls, the General Assembly vested the EMC with statewide land use planning authority rivalled in scope only by that exercised by the Coastal Resources Commission under the Coastal Area Management Act. The EMC responded by setting forth a wide range of land use and density restrictions applicable in the watersheds draining to four classifications of water supply watersheds, involving hundreds of water supplies, and tens, if not hundreds, of thousands of acres in the State of North Carolina. The local governments having jurisdiction in these watersheds were required to adopt local water supply watershed protection ordinances which incorporated the use and density restrictions as minimum requirements. There was surprisingly little fanfare about this unprecedented incursion into local land use planning by the state environmental agency.

The Clean Water Act provision invites intrusion into heretofore local land use planning decisions by the state environmental agencies, responding to a mandate in federal legislation. This could well be a landmark, or, if you will, watershed, event in the surrender of local authority in land use planning.

Section 303

Impaired waters: This provision requires states to submit lists of "impaired waters." Impaired waters are defined as waters that cannot be expected to achieve water or sediment quality standards unless there is further action to control nonpoint source pollution. Nonpoint source pollution is comes from sources other than point sources. A point source is a discrete conveyance or channel. The classic point source is a pipe, but point sources can be canals or channels of various types, and have even been construed to be barrels or dumptrucks. States must also identify the watershed of each impaired water and the sources within the area of the watershed that contribute to the impairment.

Section 304

Nonpoint source pollution control: States would be required by this provision to submit a nonpoint source pollution management program.

Plans will have to include "management measures" which must be implemented within three years of approval, except that management measures must be implemented "as expeditiously as practicable" in the watersheds to impaired waters.

This provision is another invitation for the widespread imposition of statewide land use management controls and could lead to direct federal involvement in land use decisions. The management measures would be based on EPA guidance reflecting the "best available" nonpoint pollution control practices, technologies, and the like.

The BAT management measures appear to replace best management practices (BMPs).

States would have to develop nonpoint source pollution control programs, which establish the legal authority necessary to implement management measures.

Section 501

Permit fees: States must provide for an annual permit fee assessment program under this provision.

Fees must cover at least 60 percent of the cost of administering the regulatory programs under the Clean Water Act.

The costs to be covered by the fees include the cost of processing permits, enforcement, monitoring, development of standards, modelling analysis and demonstrations, preparation and maintenance of public information systems, and evaluation of approved laboratory performance.

In the event the state fee program does not meet EPA criteria or the EPA is the permit issuer, the EPA may collect fees under a federally administered permit fee program.

Section 502

Permit program modifications: This provision changes the NPDES program in a number of significant ways.

- Authority is granted to modify NPDES permits during their term to reflect new or revised effluent guidelines or standards.
- EPA is given authority to take over permits which have not been renewed by the issuing state within 180 days of expiration of the previous permit.
- Consideration of aquatic biological conditions is mandated for permit issuance decisions.
- EPA may identify "sensitive aquatic systems" in consultation with the Fish and Wildlife Service and the National Marine Fisheries Service.
- The Fish and Wildlife Service or the National Marine Fisheries Service would be required to review any proposed permits for discharge to such systems.
- Discharges to coastal or ocean waters, or to sensitive aquatic systems which would "prevent the protection and propagation of a balanced population of fish, shellfish and wildlife" would be prohibited.
- The EPA would be required to establish biological monitoring methods, practices, and protocols and methods for quantifying acute and chronic whole effluent toxicity.
- NPDES permits would be required to have numeric limitations regarding whole effluent toxicity.
- States would also have to provide for judicial review of challenges to permits by third parties.

Section 503

Enforcement: This provision expands the types of actions that can be taken and the amounts of penalties that EPA may seek.

The bill also expands the rights of citizens to proceed against permittees for past violations where there is evidence that a violation has been repeated, apparently irrespective of the likelihood of further violations.

Federal courts are empowered to order that all, or a portion of, a penalty imposed in a citizen suit be used for projects to enhance the waterbody in which the violation occurred, making citizen suits an even more attractive vehicle for environmentalist groups.

The bill authorizes federal courts to order restoration of natural resources damaged or destroyed by a violation, the cost of which is limited by the maximum amount of civil penalty assessable under the Act.

Pretreatment standard violations are made expressly enforceable by EPA or through citizen suits. A "field citation" program, allowing designated EPA employees to administratively assess penalties of up to $25,000 per violation, is authorized. Dischargers who have been assessed civil penalties on three occasions within a five year period may be debarred from contracting with the federal government for an indefinite period. Finally, an increase is proposed in the maximum amount of civil penalties that may be assessed administratively, from $125,000 to $500,000.

Conclusion

The Water Pollution Prevention and Control Act of 1993 is an imposing proposal that will almost certainly be subject to intense debate and numerous changes before its adoption or the adoption of some substitute. However, the bill does set a tone for the direction in which Congress, or at least the authors of the bill, seem to be headed. The new direction of water pollution control seems to be source reduction and pollution prevention for point sources and land use type controls aimed at watershed management and protection for nonpoint sources. Each approach is revolutionary in the water pollution regulation field. The Clean Air Act Amendments have pointed the way for the point source type of control. This bill breaks new ground with respect to federal and state involvement in heretofore local land use control decisions as a means of water quality protection.CP

North Carolina Communities' Reaction to the 1988 Federal Fair Housing Amendments

Eric Stein
Mary Eldridge

Congress overwhelmingly passed the Fair Housing Amendments Act of 1988 (FHAA or the "Act")[1] and President Bush signed it into law. The Act has been called by a noted scholar "the most significant civil rights enactment in a generation ..."[2], but its impact has been appreciated only slowly by communities in North Carolina and other states.

What the Act Does.

The FHAA brings persons with disabilities under the protection of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, and extends to these persons too the promise of equal housing opportunity. The path-breaking original Fair Housing Act determined that many long-standing government and private practices that reduced the housing options of blacks and other minorities were unlawful. The FHAA is equally path-breaking in extending these same rights to persons with disabilities as well as to families with children. Race and disability are now on equal standing under the law; discrimination in housing against either group is unlawful.

As Congress explained, the Act:

> is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.[3]

In passing the Act, Congress recognized that people who have disabilities are full members of the community; as with any other group of people, some are good neighbors and some are not. What the FHAA in essence says is that, just as with race, no one may determine where persons with disabilities may live based merely on their label or status. Rather, as with every other citizen, housing decisions that others make for a person with disabilities may be based only on how that individual acts.

The Reach of the Act Is Wide

In sweeping language, the Act makes it unlawful for any individual or government "[t]o discriminate in the sale or rental, or to *otherwise make unavailable or deny*, a dwelling to any buyer or renter because of a handicap ...."[4] The Act further makes it unlawful for any individual or government "[t]o discriminate against any person in the *terms, conditions, or privileges of sale or rental* of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap...."[5]

The reach of the FHAA is so great because it does not simply prohibit actions taken with the *intent* to discriminate against persons with disabilities, it also prohibits apparently neutral practices that, whether intended or not, have the *effect* of restricting the housing options of persons with disabilities.[6] In addition, the FHAA provides even greater protection on the basis of handicaps than on the basis of race by affirmatively requiring

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individuals and municipalities to make "*reasonable accommodations*" in appropriate circumstances. The Act does so by defining discrimination to include:

> a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.[7]

Thus, as a whole, the Act prohibits practices that deny people with disabilities the right to choose where they wish to live by prohibiting discriminatory practices against individuals with any "handicap." The Act defines the term "handicap" broadly to mean "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment ...."[8]

The FHAA does not protect people who currently engage in unlawful use of controlled substances, but it does protect individuals who are in a treatment program for drug or alcohol abuse.[9] The Act does not protect persons "whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others."[10] The House Report makes clear, however, that direct threat can only be demonstrated through "a history of overt acts or current conduct" of a particular individual, not a generalized fear of the person's disability.[11]

The Act Encourages Enforcement

The FHAA makes the entire Fair Housing Act more effective by attracting competent attorneys to bring fair housing cases through allowing generous damages (including punitive damages) awards and allowing the award of attorney's fees. The FHAA also extends the statute of limitations. In addition, the Act liberalizes "standing" rules by extending the definition of persons who are considered "aggrieved" and therefore able to sue. The Act includes among those who are entitled to relief (1) any person who claims to have been injured by a discriminatory housing practice, or (2) any person who believes that such a person will be injured by a discriminatory housing practice that is about to occur.[12] As a result, advocacy organizations and housing providers are included among those who may sue under the Act.[13]

The FHAA's Largest Impact on Municipalities: Zoning Practices

The Fair Housing Act, of which the FHAA is now a part, explicitly trumps local and state laws that conflict with it.[14] As mentioned, Section 3604(f) of the FHAA makes it unlawful for any individual or government "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling" because of handicap. By its terms, this language covers discriminatory land-use decisions by municipalities.[15] Decisions by courts describing the same language of the original Fair Housing Act make clear that this section does cover land-use and zoning actions.[16] As the House Report to the FHAA stated in explaining both disability provisions:

> These new subsections would also apply to state or local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps. While state and local governments have authority to protect safety and health, and to regulate use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities.... *The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices*. The Act is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community.[17]

Since the amendments went into effect in 1989, a number of courts have found that municipalities' zoning regulations and decisions that denied zoning approval to facilities for the handicapped violated the Act.[18]

Dispersal Statutes

Many municipalities have passed statutes that require that homes intended for persons with disabilities be located a certain distance from other such homes. Dispersal requirements impose a quota of one home intended for persons with disabilities within a certain area. It was legally well-established under the Fair Housing Act of 1968 that quotas intended to prevent a protected class of people from becoming overconcentrated in one area violate the Act.[19] Dispersal statutes also squarely violate the FHAA since a flat ban against permitting a home occupied by individuals with handicaps to be placed within a certain area does "make unavailable or deny a dwelling to [a] buyer or renter because of a handicap."[20] In fact, that is the exact purpose of dispersal zoning provisions: to deny use of that dwelling to persons with disabilities.

In a decision affirmed by the Third Circuit Court of Appeals, a Pennsylvania federal district court concluded that dispersal requirements indeed violate the FHAA.[21] The Maryland legislature repealed a 1,000-foot distance requirement for facilities housing people with disabilities based on an opinion issued by the Maryland Attorney General advising the legislature that such a rule was illegal under the FHAA.[22] The City of Portland, Oregon did the same.

Congress could not have been more clear that rules

such as distance limits that have the effect of denying individuals with disabilities the choice of where to live can no longer be maintained.[23] There is an isolated court case to the contrary,[24] which is poorly reasoned and unlikely to be adopted elsewhere because it bases its decision on a U.S. Supreme Court case decided *before* passage of the FHAA. In fact, the U.S. Department of Justice continues to bring litigation based on the position that dispersal statutes are unlawful under the FHAA.

Occupancy Restrictions

The second major zoning rule that affects persons with disabilities prescribes the maximum number of persons who are allowed to live in a house. While municipalities generally do not limit the number of related persons who can live in a house, many do limit the number of unrelated persons who may live together to between three and five. This rule presents a problem for persons with disabilities because, as courts have found, they must often live in greater numbers because of their special needs. [25] For some individuals with disabilities a group setting may be necessary for therapeutic reasons; for others, their incomes are so low as a result of their disabilities that resources must be pooled to allow a program to succeed financially. Some courts have suggested and the Department of Justice believes that allowing sufficient densities for housing persons with disabilities is required by the "reasonable accommodations in rules, policies, practices, or services," provision of the Act.[26] Also, the Act's legislative history suggests that the prohibition against discriminating "in the terms, conditions, or privileges of sale or rental of a dwelling,"[27] would prohibit zoning practices "which have the effect of excluding ... congregate living arrangements for persons with handicaps."[28] Thus, municipalities must allow occupancy limits that are responsive to the special needs of persons with disabilities.

Special Use Permit Requirements

Many municipalities also require those developing housing for persons with disabilities to obtain a special-use type permit in a public proceeding. For a municipality to require individuals with disabilities to obtain a permit that is not required of others in order to live in a certain neighborhood discriminates in the "terms [and] conditions" of housing.[29] Additionally, the Act would bar municipalities from legislating procedural requirements that "otherwise make unavailable or deny" housing to people with disabilities. As the House Report concludes, the FHAA prohibits "conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community."[30] The public approval process often tends to mobilize neighborhoods unfairly against such houses based on stereotypes rather than conduct or experience.[31] Under the FHAA, Courts have not hesitated to strike down procedures such as these that are not required of everyone, uniformly.[32]

Enforcement of the FHAA

The potential options to enforce the FHAA if someone determines that their federal fair housing rights have been violated are dizzying. There are a number of avenues by which aggrieved parties can seek legal remedies.

Sue Privately under FHAA

An individual or group's first option is to bring suit privately in either state or federal court under the FHAA. There is no need to exhaust administrative remedies before bringing suit under the federal law. Should the party who sues win, the losing party will have to pay the winner's attorney's fees through the cost-shifting provision of the Act.

File a Complaint with HUD

Alternatively, the party can file a complaint with the agency charged with enforcing the Act, the U.S. Department of Housing and Urban Development (HUD). HUD, in turn, refers the complaint either to the U.S. Department of Justice or to the North Carolina Human Relations Commission (HRC).

U.S. Department of Justice

If the case concerns zoning, HUD will likely refer it to the U.S. Department of Justice (DOJ) for prosecution, as specifically directed in the Act to ensure effective enforcement of zoning and land-use matters.[33] DOJ can bring suit itself in federal court or intervene in an existing suit brought by a private party or the HRC.[34] In addition, an aggrieved party can bring concerns directly to DOJ initially.

N.C. Human Relations Commission

When HUD receives a complaint that is not appropriate for referral to the Department of Justice, HUD likely will refer it to the HRC. HUD makes this referral because it has determined the HRC to be a "substantially equivalent" agency to HUD with respect to fair housing enforcement. HUD made this determination because the HRC's enabling legislation--the State Fair Housing Act--in large part tracks the federal Act. A private party also can file a complaint with the HRC directly under the state law as an alternative to using the federal law. Before suing privately under the state law, an individual must exhaust administrative remedies by filing first with the HRC.

The HRC investigates all cases referred to it, which provides free discovery to plaintiffs, and determines whether there are "reasonable grounds" to bring suit. If

it determines that reasonable grounds exist, the HRC is then required to enforce the state law (even if the original complaint was to HUD under the federal law). If either party or the HRC desires to sue in court, the HRC itself will bring suit in state court under the state law. This occurs about half the time.[35] Otherwise, the HRC will bring the case to the Office of Administrative Hearings, where it is heard by an administrative law judge, who recommends a decision to a panel of three HRC commissioners. On the other hand, if the HRC does not find reasonable grounds to sue, it issues the complaining individual a right to sue letter. At this time, the party may bring suit privately under the state law or still may choose to sue under the federal law.

In general, particularly in zoning cases, aggrieved parties will probably find their rights better protected by using the federal rather than the state law because rights under the federal FHAA are clearer and the case law is better developed.

North Carolina Communities and the FHAA

North Carolina, even before adoption of the FHAA, recognized the special occupancy requirements of persons with disabilities and the problems inherent in special use permits in such cases.

In 1981 the General Assembly enacted a statute that authorized family care homes of up to six handicapped residents plus staff to be located in any residential zoning district in the state and prohibited the requirement of any special approval procedure.[36] The statute states North Carolina's purpose "to provide handicapped persons with the opportunity to live in a normal residential environment." The statute does, however, allow municipalities to impose a half-mile dispersal rule.

Many municipalities still retain dispersal and special use requirements and have unduly restrictive occupancy standards for persons with disabilities. Now that the FHAA is law, state and local governments may face costly legal actions if they fail to eliminate statutes that in effect make a dwelling unavailable to any buyer or renter because of a handicap.

While North Carolina communities have not reacted swiftly to change local statutes following passage of the Fair Housing Amendments Act, a number of questions have been raised about the legality of existing laws, and during the past two years many local practices have been challenged.

Durham Sets a Good Example

Shortly after passage of the Fair Housing Amendments Act, a use permit to build a house on a nonconforming lot of record was requested in the City of Durham. Such permits are routinely granted by the City's Board of Adjustment if the proposed house is physically compatible with surrounding houses. This particular house was being built for persons with mental illness, and when neighbors learned of the proposed use, they made a number of calls to the City opposing the home.

Before holding the hearing on the permit request, the Durham Assistant City Attorney and the chair of the Durham Board of Adjustment conferred and reviewed existing law, including North Carolina General Statute 168-9, which generally protects the handicapped from discrimination in housing, and the FHAA. They agreed that comments about the disabled status of the residents were irrelevant to the issuance of the permit and that allowing such comments would prejudice the proceedings by introducing evidence that could lead to impermissible discrimination.

Group home for persons with mental illness.

A number of neighbors attended the hearing to oppose the permit. The first speaker was an advocate for persons with mental disabilities, who was aware of community opposition and planned to talk to the Board about the need in Durham for the proposed home. The Board chair interrupted at the first mention of mental illness and stated that the status of the proposed resi-

dents of the house was irrelevant and that the Board therefore would not allow discussion about them. No further discussion about the proposed residents or use of the house was allowed from either the proponents or the opponents. Evidence was limited to size, location, and parking. The Board, properly treating the request as it would any similar request for a single family home, approved the permit.

The City of Hendersonville Is Ordered To Comply

In 1992, a North Carolina court ordered the City of Hendersonville to approve a special use permit for a housing development for persons with mental illness following several months of heated community controversy. In August 1991, after months of searching for a suitable building site, the Mental Health Association in North Carolina (MHA/NC) had signed an option to purchase land in Hendersonville, where it planned to construct eleven one-bedroom apartments for ten persons with mental illness and a resident manager. The individuals who would be able to move into the new apartments were clients of the community mental health program; their illnesses were stabilized with medication, and they received a number of other services that enabled them to live independently in the community. Generally, their housing at the time was neither decent nor affordable, with most paying more than half of their income for housing costs.

In response to an application for funding submitted by MHA/NC, HUD had approved the site and committed to the project $494,100 for land acquisition and construction and an additional $1,000,000 to be used over a 20-year period as rental assistance to make the apartments affordable. The HUD fund reservation would expire if construction did not begin by March 31, 1992.

As the developer of the proposed housing, the MHA/NC hired an architect, who conferred with the Hendersonville City planner. Following the planner's guidance about zoning requirements, the architect prepared and submitted plans to the City along with an application for a Planned Use Development (PUD) special use permit, which the City routinely requires for all apartment developments of more than four units.

The City planner reviewed the plans and the application, saw that they met all city requirements for a PUD permit, including all architectural, engineering, and environmental requirements. He informed the MHA/NC's architect that he would recommend approval and that he anticipated that the Hendersonville Planning and Zoning Board's approval at its January 1992 meeting would be routine. At that meeting, however, one member of the Board moved that the matter be tabled, despite the City planner's recommendation. Neighbors of the proposed project had learned that the apartments were to be occupied by persons with mental illness and had submitted a petition to the Board opposing the project. During subsequent court action, it was alleged that the Board member who moved to table the request for a special use permit is the son of two individuals who had signed the petition.[37]

This action by the Board alerted the MHA/NC to the fact that community opposition had fallen on fertile ground, and the organization contacted Carolina Legal Assistance, which works with attorneys of local legal services offices and pro bono attorneys to protect the legal rights of individuals with mental disabilities. As a result of this early contact, during each step of the ensuing process, the statements and actions of both the opponents and the Board members were closely monitored and documented.

Once the development of these apartments was taken off of the track that similar housing developments routinely follow, opposition by neighbors and others in the community increased. At the Planning and Zoning Board's February 1992 meeting, considerable discussion occurred including, according to court documents, vociferous opposition to the development. Among the concerns expressed were drainage problems, flooding, devaluation of property, and the "institutional effect" the development might have on the neighborhood. One resident declared that she did not want this "mental institution" near her. [38]

The City offered no technical or scientific evidence in support of the drainage and flooding concerns. Nonetheless, the Board voted to once again table the request and to send it to a subcommittee for further study. The subcommittee was chaired by the individual who had initially moved to table the request.

At the March 1992 meeting of the Planning and Zoning Board, the City planner stated that the plan met all technical requirements and, again, recommended approval. The subcommittee gave a report expressing its belief that the apartment plan was "not in harmony with the existing immediate residential neighborhood."[39] To address concerns about flooding, the project's architect presented engineering data showing that the effect of water runoff would be minimal--less than two inches in a fifty-year storm. The MHA/NC addressed concerns about property values by presenting studies showing that values do not decline as a result of such developments. The Planning and Zoning Board, however, adopted the subcommittee's recommendation to deny the request for a special use permit.

Faced with certain further delay, the MHA/NC requested HUD to extend the fund reservation for the apartments to September 30, 1992, and HUD granted the extension, stating that further extensions would not be granted.

According to the Zoning Ordinance of the City of Hendersonville, Planning Board recommendations with

respect to Planned Unit Developments must be reviewed and approved by the Mayor and the City Council. The proposed development was discussed at the April 1992 meeting of the City Council. Again, neighborhood opposition to the complex was vocal and included concern that the neighborhood was near schools, and that those living in the area wished to keep the neighborhood family-oriented and safe. A member of the City Council stated that the proposed plan was not compatible with the "people" in the neighborhood. The architect for the proposed development testified that it would not adversely affect flooding in the area and that the complex had been redesigned from two-story to one-story units to better conform to the appearance of the surrounding homes. No expert opinion or documentation was presented to support the contention that the development would adversely affect flooding in the area.

The City planner again recommended approval of the special use permit. The City Council voted unanimously to deny approval. The stated reasons were that the development would have an adverse impact on flooding in the neighborhood, that the complex would have an adverse impact on the single-family character of the neighborhood, and that it was not "in harmony" with the neighborhood. In later court action, the plaintiffs pointed out to the court that the site was zoned for apartments, that apartment complexes in single-family neighborhoods are common in Hendersonville, and that there are, in fact, a privately owned triplex within 50 yards of the site and eight units of public housing in duplex format within 200 yards of it.

In May 1992, Carolina Legal Assistance and Pisgah Legal Services, representing plaintiff Jeffrey Blackwell, an individual who planned to move into the apartment development, and an attorney for plaintiff MHA/NC sued in state court to allow the project to go forward before HUD funding would be withdrawn.

The attorneys stated that the City's denial of the special use permit constituted a discriminatory housing practice under three separate provisions of the Fair Housing Amendments Act discussed earlier in this article. First, plaintiffs alleged that the City unlawfully made the proposed residence unavailable to plaintiff Blackwell because of his handicap in violation of Section 3604(f)(1) of the Act. Second, plaintiffs accused the City of violating Section (f)(3)(b) by refusing to make reasonable accommodations in rules, policies, and practices so as to afford persons with handicaps equal opportunity to choose, use, and enjoy a residence. Third, plaintiffs alleged that the City had treated plaintiffs differently from persons without handicaps in the terms, conditions, and/or privileges for residences in Hendersonville in violation of Section 3604(f)(2) of the Act.[40]

In papers filed with the court, plaintiffs stated that while proof of discriminatory intent is not required under the Act, such intent could be inferred in the present case for the following reasons: (1) the City's decision to withhold the special use permit had a discriminatory impact, since the only class of persons affected by the decision would be persons with mental disabilities;[41] (2) the City departed from normal zoning procedures in repeatedly tabling the request and then referring it to a special subcommittee chaired by a man with a known conflict of interest;[42] (3) members of the decision-making body made contemporary statements that indicated that they acted for the purpose of effectuating the desires of private citizens and that a motivating factor behind those desires included the fact that the proposed residents of the housing were mentally ill;[43] (4) the concerns expressed by the City about the lay of the land and drainage were clearly pretextual;[44]and (5) the contentions that the plaintiffs' development was "not in harmony" or "not compatible" with the neighborhood were a thinly veiled camouflage for public opposition based on fears and stereotypes about the potential residents.[45]

Following a hearing on the matter, Judge Julia Jones, Superior Court Judge Presiding, issued an order based on her finding that the defendant had no valid basis for denying the special use permit and had violated the Fair Housing Act, as amended, in denying the permit. The judge also found that plaintiffs "would incur immediate, irreparable injury if an injunction is not issued because they have no other adequate remedy at law to preserve their rights to substantial HUD funding to build the needed housing for mentally handicapped people."[46]

The Judge's order was clear and, in its broad scope, ensured that the housing project could be developed without further interference:

> It is ordered that the defendant and all other persons, boards and bodies who are its officers, officials, agents, servants, employees, and attorneys are hereby permanently enjoined from failing to grant plaintiff Mental Health Association in North Carolina, Inc. a Planned Use Development permit for the site ... Defendant and all other persons, boards and bodies who are its officers, officials, agents, servants, employees, and attorneys are also enjoined permanently from failing to make all reasonable accommodations in rules, policies, practices, or services as may be necessary to afford mentally handicapped individuals the opportunity to reside in the development planned by MHA ... Any violation of this Judgment is in contempt of court and punishable by both civil and criminal contempt powers of this court upon proper showing.

The City of Albemarle Avoids a Legal Challenge

In 1993, the MHA/NC submitted an application to HUD for funding to develop apartments for individuals

with mental illness in Albemarle. When local citizens learned of the pending application, they contacted the Center Director of the Stanly County Mental Health Program and City Council members and voiced their opposition. The City Council requested the Center Director canvas the people living in the area to find out how the neighbors would feel about such a project. The Center Director declined to do so, informing the City Council that, in his opinion, this would violate the Fair Housing Amendments Act.

When local citizens continued calling the mental health center about the proposed housing, the Director contacted the consultant for the MHA/NC to obtain a copy of the Fair Housing Amendments Act. He also obtained information about the court order against Hendersonville and contacted staff in that city to learn more about their experience with community opposition. The impression he gained from a Hendersonville staff person was that the judge "had ordered them to issue the permit or they could all go to jail."[47]

The Center Director then hosted a meeting to inform the community about the need for the housing and about the rights guaranteed to individuals with disabilities by the Fair Housing Amendments Act. Subsequently, HUD approved the application, and the developer anticipates receiving full cooperation from the City of Albemarle during construction of the project.

Apartments for people with mental illness, sponsored by the Mental Health Association in North Carolina.

Raleigh Exhibits Enlightened Self-Interest

The City of Raleigh Zoning Code classifies facilities that provide housing for persons with disabilities (and other designated special population groups) according to whether they are a group care facility, family care home, or family group home. Different facilities allow different occupancies, may be located in different zoning districts, and must be located a half mile away from another facility in that category and 100 yards from a facility in another category. The classification system was developed in an ad hoc manner and is cumbersome. The Raleigh Code also requires the issuance of a special use permit for group care facilities through a quasi-judicial evidentiary hearing.

The Raleigh Code's legality after passage of the FHAA has recently been challenged by two parties. The first individual was denied zoning permission to open a family care home because it would be located (just) within a half-mile of an existing family care home. She filed a complaint with the N.C. Human Relations Commission, which investigated and referred the case to the U.S. Department of Justice.

In the second case, Raleigh has threatened five Oxford House, Inc. houses with closure because they don't meet the family care home requirements that (1) there be no more than six persons with disabilities in a house and (2) there be on-site staff supervision. Oxford House sponsors houses in which up to ten persons recovering from substance addiction live on their own. Oxford House believes that people stop abusing substances by assuming the responsibility of maintaining a job and a household and by peer pressure--a resident is kicked out if he or she uses substances again. The effectiveness of peer pressure, according to Oxford House, would be undermined by the presence of staff on site. Oxford House filed a complaint against Raleigh with HUD and retained a local attorney. HUD also referred the case to the Department of Justice.

As a result of the referral of these cases, lawyers from the Department of Justice met with the staff of the Raleigh City Attorney's office. Following this meeting, the Raleigh City Attorney reported to the Law and finance Committee of the Raleigh City Council that the Justice Department was prepared to bring suit against the City if it enforced the current zoning laws regarding dispersal, occupancy and supervision in the two cases at hand.

Two lawyers from the Department of Justice met with the staff of the Raleigh City Attorney's office and communicated the Department's firm position that Raleigh's dispersal statute is unlawful under the FHAA, that

Raleigh must make a reasonable accommodation to Oxford House by allowing larger numbers of individuals to occupy one residence, and that Raleigh cannot insist that an Oxford House residence must have on-site staff supervision since this runs counter to the needs of residents. The DOJ lawyers indicated that they would bring suit against the City if it enforced the zoning laws as written.

Partly as a consequence of this meeting, the Law and Finance Committee of the Raleigh City Council has re-examined its treatment of special population housing. The City Attorney recommended that the City eliminate dispersal requirements entirely and accommodate greater occupancies to satisfy the Justice Department's interpretation of the FHAA. The Committee, over a five month period, heard from numerous groups representing persons with disabilities and other special needs as well as many neighborhood representatives. It has now developed a recommendation that has been scheduled for public hearing before the full Council and the Planning Commission that does not fully satisfy any group but is a constructive effort to meet the requirements of the FHAA, special population housing needs, and neighborhood interests.

Apartments for people with physical disabilities including families with children, developed by the North Carolina Community Land Trustees and the Handicapped Housing Corporation of Durham.

The Law and Finance proposal has three significant aspects. First, it continues not to limit where housing for persons with disabilities may be located if it meets existing occupancy requirements--that is, the housing allows no more than four unrelated persons in a dwelling unit. Second, the proposal allows a larger number of occupants with disabilities to reside in a dwelling that is "supervised" by on-site staff. It permits up to two adults to live in a bedroom, with no upper limit on the number who can live in the house. Up to four children (related to the adults) may share the bedroom with one or two adults. Groups who choose this option, however, will have to abide by an "incentive" dispersal requirement of 300 yards from another such high occupancy dwelling. Groups appearing before the Committee generally accepted this reduced spacing requirement in exchange for the other provisions of the proposal. This housing, different from current law, could be placed in any zoning district in the city and there would be no special parking requirements to avoid making the house appear institutional. Also, there would be no requirement to comply with a special process to gain permission for this use; instead, groups would register their locations and occupancies with the City to ensure that they abide by the 300-yard spacing requirement.

Finally, the proposal provides a reasonable accommodation for persons with mental disabilities in a particularly creative manner. Surveys have shown that the vast majority of persons with mental disabilities desire to live alone or with a chosen roommate in residential neighborhoods scattered throughout the community. In addition, numerous studies have shown that this "supportive housing" model, with services available "off-site" and on demand, not only is generally preferred but also is effective.[48]

Local groups who attempt to meet this need for persons who are able to live independently have found that it is met most effectively in multi-unit one bedroom housing. This type of housing, however, is only available in the downtown areas that are zoned for higher-density housing. In other parts of the city this type housing either is not allowed (for example, in R-4 zoning) or is too expensive to develop because more land is required where zoning density allowances are lower. These groups argued that the impact of housing for people with disabilities on the neighborhood is reduced if up to four persons have their own apartments than if they are forced to live together in one dwelling unit, with consequent roommate frictions.[49] The Law and Finance proposal responds to these concerns by allowing up to four attached units of housing to be treated as a single family dwelling anywhere in the city so long as the total number of persons in the "Multi-Unit Supportive Housing Residence" does not exceed six.

The Law and Finance proposal still is vulnerable to challenge under the FHAA because it includes 300-yard dispersal and "supervision" requirements, and it has yet to be adopted by the full City Council. If adopted, however, it would be a significant improvement over existing law that is worthy of the attention of other North Carolina communities.

The Department of Justice Visits Charlotte

In 1993, residents of a neighborhood in Charlotte voiced strong opposition to the construction that was underway in their area of a group home for individuals with AIDS. Following this opposition, the City of Charlotte canceled the previously approved building permit. The non-profit organization that had received funding from HUD to develop the home filed a complaint with HUD pursuant to 42 U.S.C. Section 3610(g)(2)(C). HUD staff determined that the complaint involved the legality of a zoning ordinance. Since a number of other organizations were complaining that their group homes also had been negatively affected by City actions, it seemed that a pattern or practice of discriminatory treatment of projects for the disabled might be occurring in Charlotte. HUD referred the complaint to the Department of Justice (DOJ).

In late October 1993, staff attorneys of the DOJ visited Charlotte and met with staff of a number of non-profit organizations that provide housing for persons with disabilities and their consultant. The DOJ attorneys were told of a number of actions that had prevented or delayed development of projects and that these actions were not routinely experienced by developers of single family homes in similarly zoned neighborhoods in Charlotte. Actions that were thought to be discriminatory included not allowing parking in the required setback area, requiring space-consuming turn-around areas, and imposing special technical requirements for water lines.[50]

Following this meeting, the DOJ attorneys met with legal staff of the City of Charlotte. Further action is pending.CP

Notes

1Pub L. No. 100-430, 102 Stat. 1619 (1988) codified at 43 U.S.C. Section 3601 et seq. (effective March 12, 1989).

2James Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 Vanderbilt L.Rev. 1049, 1096 (1989).

3The Report of the House Committee on the Judiciary, hereinafter called the "House Report," is the only published legislative history; there is no corresponding report from the Senate. H.R. Rep. No. 100-711, 100th Cong. 2d Sess. 18 (1988), reprinted in 1988 U.S.C.C.A.N. 2173.

442 U.S.C. Section 3604(f)(1). The section goes on: "of - (A) that buyer or renter, (B) a person residing in or intending to reside in that dwelling after it is so sold, rented or made available; or (C) any person associated with that buyer or renter."

542 U.S.C. Section 3604(f)(2).

6See Smith v. Town of Clarkton, N.C., 682 F.2d 1055, 1065 (4th Cir. 1982).

742 U.S.C. Section 3604(f)(3)(B). The FHAA borrows the concept of "reasonable accommodation" from section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794.

842 U.S.C. Section 3602(h). This definition also originated in section 504.

942 U.S.C. Section 3602(h)(3); see United States v. Southern Management Corp., 955 F.2d 914, 923 (4th Cir. 1992).

10U.S.C. 42 Section 3604(f)(9).

11House Report at 29.

1242 U.S.C. Section 3602(i).

13See 24 C.F.R. Section 100.20 (HUD Regulations).

1442 U.S.C Section 3615.

15Additionally the FHAA makes clear that "State or local zoning or land use law or ordinance" is subject to the Act's prohibitions against restricting the housing choices of people with disabilities because the act specifically directs the Secretary of HUD to refer such cases to the U.S. Attorney General for prosecution. 42 U.S.C. Section 3610(g)(2)(C).

16See, e.g., Smith v. Town of Clarkton, 682 F.2d 1055, 1068 (4th Cir. 1982) (withdrawal from multi-city low income housing authority); Huntington Branch, NAACP v. Huntington, 844 F.2d 926, 942 (2d Cir.), aff'd, m109 S. Ct.276 (1988); Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir.1977), cert. denied, 434 U.S. 1025 (1978) (refusal to rezone); Atkins v. Robinson, 545 F. Supp. 852 (E.D. Va. 1982), aff'd, 733 F.2d 318 (4th Cir. 1984) (veto by county board of proposed housing project).

17H.R. Rep. No. 100-711, 100th Cong. 2d Sess. 24 (1988).

18See, e.g., Marbrunak, Inc. v. City of Stow, 973 F. 2d 43 (6th Cir. 1992) (zoning ordinance struck down because discriminatory against persons with disabilities); United States v. Audubon, 797 F. Supp. 353 (D.N.J. 1991); Glover v. Crestwood Lake Section 1 Holding Corp., 746 F. Supp. 301, 310 (S.D.N.Y. 1990); Association of Relatives & Friends of AIDS Patients v. Regulations & Permits Admin., 740 F. Supp. 95 (D.P.R. 1990); Baxter v. City of Belleville, 720 F. Supp. 720 (S.D. Ill. 1989).

19For example, in United States v. Starrett City Assoc., Inc., 840 F.2d 1096 (2d Cir. 1988), cert. denied, Accord, United States v. Charlottesville Redevelopment & Housing Authority, 718 F. Supp. 461 (W.D. Va. 1989); Burney v. Housing Authority of the County of Beaver, 551 F. Supp. 488 U.S. 946 (1989), a large New York housing developer imposed limitations on the percentage of blacks and Hispanics who could become tenants in order to maintain racial integration in the complex. Starrett City justified the quota system as necessary to prevent "tipping," a process by which white tenants exceed a certain percentage of the total and are considered likely to move out. The Second Circuit Court of Appeals concluded, however, that promoting racial integration does not justify an inflexible rule that has the result of limiting the housing choices of a class protected by the Fair Housing Act. 746 (W.D. Pa. 1989). A dispersal statute for persons with disabilities is analytically indistinguishable from the Starrett City rule, and is similarly unlawful.

2042 U.S.C. 3604 (f) (1); see House Report at 24; 24 C.F.R. Section 100.70 (HUD regulations).

2174 Opinions of the Attorney General of Maryland (Op. No. 89-026) (Aug 7, 1989)

22Ibid

23 In addition, imposing the distance rule on individuals with disabilities and not others violates Section 3604(f)(2) of the FHAA because the rule constitutes "terms [and] conditions . . . [in the] sale or rental of a dwelling" that are imposed merely "because of a handicap." 42 U.S.C. Section 3604(f)(2). As the House Report states, "[s]ince these requirements are not imposed on families and groups of similar size of other unrelated people, these requirements have the effect of discriminating against people with disabilities." House Report at 24.

24The Eighth Circuit Court of Appeals in Familystyle v. City of St. Paul, 923 F.2d 91 (8th Cir. 1991) concluded that the City's quarter-

mile spacing requirements for group homes did not violate the FHAA because there is a more lenient standard of review for victims of handicap discrimination than that afforded to victims of other forms of discrimination. It did so by using the rational basis constitutional test announced by the Supreme Court in City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985), to evaluate handicap discrimination under the act. The Supreme Court adopted the lower test for persons with handicaps under the Equal Protection Clause of the Constitution in 1985, before Congress adopted the FHAA in 1988. The FHAA went beyond the constitutional protection to which the Court referred in Cleburne, however, and made it flatly illegal to "discriminate against any person ... because of a handicap." 42 U.S.C. Section 3604(f)(2). Congress was free to, and chose to, provide a greater level of protection for persons with disabilities legislatively through the Fair Housing Amendments Act than the floor thatthe Supreme Court had indicated the Constitution already provided in Cleburne. There is no support in the Act or its legislative history whatsoever for the proposition that Congress intended to provide a lower level of protection for individuals with disabilities than that afforded to other protected classes. HUD, the federal agency charged with interpreting the Act, concluded that "persons with handicaps . . . must be provided the same protections as other classes of persons" under the Fair Housing Act. Preamble, 54 Fed. Reg. 3232, 3236 (Jan. 23, 1989). Courts owe HUD's interpretation great deference. Trafficante v. Metropolitan Life Ins. Co., 409 U.W. 205, 210 (1972).

25 Oxford House-Evergreen v. City of Plainfield, F. Supp. 1329 (D.N.J. 1991).

26 42 U.S.C. Section 3604 (f)(3)(B) see Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450 (D.N.J. 1992); United States v. City of Taylor, 798 F. Supp. 442 (E.D. Mich. 1992); Oxford House-Evergreen v. City of Plainfield, 769 F. Supp. 1329 (D.N.J. 1991).

27 42 U.S.C. Section 3604 (f)(2).

28 House Report at 23.

29 42 U.S.C. Section 3604 (f)(2).

30 42 U.S.C. Section 3604 (f)(2); House Report at 24.

31 For example, "The Effects of Group Homes on Neighboring Property: An Annotated Bibliography by the Mental Health Law Project" (Washington, D.C. 1988) surveys the literature and annotates over 40 studies that demonstrate property values of neighboring properties do not go down near homes for persons with disabilities.

32 In Marbrunak, Inc. v. City of Stow, 974 F.2d 43 (6th Cir. 1992) the Sixth Circuit Court of Appeals concluded that requiring a home for individuals with disabilites to seek a zoning variance from safety requirements that were more extensive than those imposed on others violated the FHAA. The court prevented the municipality from forcing the plaintiff to submit to the public, potentially invasive, expensive, and "arduous and time-consuming process" of applying for and obtaining a conditional use permit soley because the individuals to be housed were members of a class protected under the FHAA. Id. at 47; see also Potomac Group Homes v. Montgomery County, 823 F. Supp. 1285, 1298 (D. Md. 1993) (striking down neighbor notification and public program review board requirements for approval of group homes); Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450, 464 (D.N.J. 1992); Stuart B. McKinney Foundation, Inc. v. Town of Fairfield, F. Supp. 1197 (D. Conn. 1992).

33 42 U.S.C. Section 3610 (g) (2) (c).

34 *See* U.S.C. Section 3614(a) (DOJ can bring suit if it finds "a pattern or practice of resistance to the full enjoyment of" fair housing rights or that the matter raises an issue of "general public importance").

35 Telephone interview by Eric Stein with Daniel D. Addison, Assistant Director and Legal Counsel to the North Carolina Human Relations Commission (October 22, 1993).

36 N.C.G.S. 168-20 et seq.

37 Blackwell v. City of Hendersonville, No. 92-CVS-549, Petition for Judicial Review and Complaint at 4 (N.C. Super. Ct. 1992).

38 Blackwell v. City of Hendersonville, No. 92-CVS-549, Petition for Judicial Review and Complaint at 4 (N.C. Super. Ct. 1992).

39 Blackwell v. City of Hendersonville, No. 92-CVS-549, Petition for Judicial Review and Complaint at 5 (N.C. Super. Ct. 1992).

40 Id. at 9.

41 Citing Smith v. Clarkton, 682 F.2nd 1055 (4th Cir 1982).

42 Id.

43 Citing U.S. v. City of Birmingham, Mich., 538 F.Supp. 819 (E.D. Mich. 1982).

44 Citing Oxford House-Evergreen v. City of Plainfield, F.Supp. 1329 (D.N.J. 1991).

45 Citing Baxter v. City of Belleville, 720 F. Supp 720(S.D. Ill. 1989).

46 Blackwell v. City of Hendersonville, No. 92-CVS-549, Permanent Injunction and Judgment at 2 (N.C. Super. Ct. 1992).

47 Telephone interview by Mary Eldridge with Sam Davis, Center Director of the Stanly County Mental Health Program (November 9, 1993).

48 See sources collected in Sandra Newman, John Hopkins University Institute for Policy Studies (September, 1992). *The Severely Mentally Ill Homeless: Housing Needs and Housing Policy*. Baltimore , Maryland.

49 See Parish of Jefferson v. Allied Health Care, Inc. (E.D. La. filed June 10, 1992) at 13 (impact of housing on neighborhood is determined by the number of occupants, not the number of physical

Home Mortgage Disclosure Act: A Tool for Separating the Wheat from the Chaff

Peter Skillern

To the surprise of many in attendance, community activists and financial institutions found common ground at a federal hearing on the Community Reinvestment Act (CRA) held in Henderson, North Carolina on September 15, 1993. Both groups' message was loud and clear: that federal regulators' current CRA evaluation of financial institutions focuses too much on process and too little on results. Under a directive from President Clinton, federal financial regulatory institutions conducted public hearings across the nation on how to improve enforcement of CRA. The suggested reforms for CRA could have an important impact on financial institutions' role in financing housing, community and economic development.

While many at the hearing agreed that changes needed to be made, deciding how to measure performance was unexplored. The analysis presented in this article is a specific proposal for using existing mortgage lending data required by the Home Mortgage Disclosure Act (HMDA) to measure an institution's performance in lending to minority and low-income households.

The evaluation of lending to minority and low-income households is an important issue for community development activists. Access to credit is vital for individual and neighborhood economic vitality. The disparity in lending between white and black households and the failure to serve the needs of low-income communities promotes economic inequities between races and the deterioration of neighborhoods. For example, in the Raleigh-Durham Metropolitan Statistical Area (MSA) in 1991, minority applicants were denied mortgages three times as often as white applicants regardless of income. The HMDA data reflects a pervasive pattern of race playing a role in mortgage loan decisions. This pattern is having a detrimental effect on the economic well-being of the African-American community. In Durham County, 33 percent of black households own a home compared to 53 percent of the white population. As a percentage, black households occupy housing without complete plumbing at twice the rate of whites. Denial of credit is a contributing factor to these disparities.

The Boston Federal Reserve study of mortgage lending decisions of Boston financial institutions concludes that race played a role in 56 percent of loan denials to minorities.[1] Assuming that this estimate is also accurate for the Raleigh-Durham MSA, 284 or 56 percent of 508 black households were denied a mortgage for a single-family home based on disparate treatment of race. The role of race in lending decisions may be more substantial than these figures suggest as potential black applicants who may have been discouraged from applying are not represented.

The HMDA Analysis

The following analysis was conducted by Peter Skillern and Margrit Bergholz of the Durham Affordable Housing Coalition for the North Carolina Community Reinvestment Coalition of North Carolina and was submitted as testimony at the federal hearing in Henderson. The complete study makes a similar analysis for all depository institutions in the metropolitan areas of North Carolina. The study was originally commissioned to help local community groups organize on CRA issues and to educate the public and regulators on the lending practices of financial institutions. The analysis was done on a personal computer using electronic data from the loan registry of each mortgage lender in North Carolina.

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The seeds of this project have matured from a Departmental Paper at the University of North Carolina's Department of City and Regional Planning. The current method was influenced by other analysts such as Ira Goldstein with the U.S. Department of Housing and Urban Development, Systemic Investigations Branch. In his paper, "Methods for Identifying Lenders for Investigation Under the Fair Housing Act," Goldstein uses a similar evaluation of HMDA data to categorize financial institutions' lending performance as a way of targeting banks whose treatment of minority and low-income applicants is not in compliance with CRA or fair housing laws. Similarly, this study is an example of how regulators and activists can evaluate a financial institutions' CRA performance relative to its competitors. Examples of individual bank analysis are provided as well in Figures 1 and 2 and Tables 1 and 2.

Conclusions of discrimination can not be made reliably from HMDA analysis alone. One can safely say that HMDA data can be indicators of disparate treatment which may be further investigated by testing and review of completed loan applications. This study should be only the first step in identifying and correcting patterns and practices of discrimination in mortgage lending.

Mortgage lenders which are depository institutions or affiliated mortgage companies were ranked on their performance in lending to minority and low-income households for the Raleigh-Durham MSA in 1991. The results of this ranking are given in Tables 3 and 4.

The ranking favors neither large nor small institutions. The most important factor in performance seems to be the institution's commitment to lending to minority and low-income households. Asset size or mortgage products were not the determining factors in performance.

Explanation of Indicators

The following is an explanation of the HMDA indicators used in evaluating financial institutions performance in serving minority and low-income households.

Percentage of Applications breaks down the financial institution's applicant pool by race and income. In evaluating lending to the minority community, this is used as an indicator of how well a financial institution is capturing minority applicants. The financial institution with the highest percentage of minority applicants was ranked first, and the lowest ranked twenty-fifth. Black households made up fourteen percent of all mortgage applicants in the Raleigh-Durham MSA. This percentage is another measuring stick of whether a financial institution is above or below the available market demand of black applicants. If an institution's share of minority and low-income applications is significantly lower than its competitors' or the area average, this may indicate a poor performance in outreach and marketing to the minority community or steering and discouragement of potential black applicants.

Ratio of Black to White Denials is the percentage of black applicants denied a loan compared to the percentage of white applicants denied. The institution with the lowest ratio ranked first, and the institution with the highest ratio ranked twenty-fifth. This ratio must be looked at closely and within the context of the other indicators. For example, Citizens Savings Bank received a "1" ranking on this indicator because the ratio was zero. While not denying any loans to its two black applicants, neither did it make loans to them. The applications were either withdrawn or were approved but not accepted. Citizens Savings Bank was ranked twenty-first in percentage of portfolio loans made to black households and ranked seventeenth in percentage of black applicants.

Having no denials may indicate that pre-screening of potential applicants is occurring. For example, Guaranty State Bank had ten black applicants and 32 white applicants. Guaranty approved and originated all 42 loans. This may indicate that Guaranty is pre-screening potential applicants and accepting only pre-approved applications. The HMDA data does not reflect the number of potential applicants who may have been discouraged from applying. It should be noted that Guaranty ranked high in its overall lending performance to minority and low-income households.

Ranking financial institutions on their denial ratio may create the perception that a rejection rate of three to one is acceptable merely because some financial institutions have a five to one or ten to one ratio. The only way to determine discrimination is through testing or reviewing application files. Yet considering the Boston Federal Reserve study which estimated that race was a factor in 56 percent of loans denied to minorities, the disparate rejection rates among races is still a valid concern. This is underscored by the consistent pattern in which black households are denied loans at a higher rate than whites regardless of income.

Although the denial ratio may be misleading when used alone, it remains an effective indicator of disparate treatment in the loan decision-making process. Once again, HMDA data do not prove disparate treatment by an individual institution, but can be used as an indicator of practices and patterns.

Percentage of Portfolio shows the percentage of a financial institution's portfolio lent to black versus white households. Use of this indicator makes a comparison among different-sized institutions possible. The bank with the highest percentage of its portfolio lent to black households was ranked first and the bank with the lowest

HMDA Indicators of Performaoce in Serving Minority Households
Mortgage Applications, Denials and Amounts by Race and Income for 1991

Citizens Savings Bank, Inc.
Bank ID Number: 000000973

Metropolitan Statistical Area: Raleigh, Durham

	Percentage of applications	Applied 1991	Denied 1991	Percentage Denied	Ratio of Black to White Denials	Amount Loaned $000's	% of portfolio by race and income
Total Black	3%	2	0	0%	N/A	$0	0%
Total White	92%	56	5	9%	N/A	$3,746	92%
Total Applicants		61				$4,074	
Black: Less than 80% of MSA	2%	1	0	0%	N/A	$0	0%
White: Less than 80% of MSA	13%	8	1	13%	N/A	$181	4%
Black. 80-120% of MSA	2%	1	0	0%	N/A	$0	0%
White: 80-120% of MSA	25%	15	0	0%	N/A	$937	23%
Black: More than 120% of MSA	0%	0	0	0%	N/A	$0	0%
White: More than 120% of MSA	54%	33	4	12%	N/A	$2,628	65%

HMDA Indicators of Performance in Serving Low Income Households

	Number of Loans Originated	Average Income of Applicant $000's	Percentage of Portfolio Loaned to Families with Incomes below 80% of Median	Average Loan Size $000's	Smallest Loan Made $000's	Percentage of FHA/VA/FMHA Loans Made
Black Applicants	10	$37	9%	$26	1	0%
White Applicants	32	$52	1%	$26	2	0%
All Applicants	46	$44	27%	$37	1	0%

Table 1.

HMDA Indicators of Performance in Serving Minority Households
Mortgage Applications, Denials and Amounts by Race and Income for 1991

Guaranty State Bank
Bank ID Number: 0000009849

Metropolitan Statistical Area: Raleigh, Durham

	Percentage of applications	Applied 1991	Denied 1991	Percentage Denied	Ratio of Black to White Denials	Amount Loaned $000's	% of portfolio by race and income
Total Black	22%	10	0	0%	N/A	$261	15%
Total White	70%	32	0	0%	N/A	$1,163	68%
Total Applicants		46				$1,699	
Black: Less than 80% of MSA	13%	6	0	0%	N/A	$161	9%
White: Less than 80% of MSA	11%	5	0	0%	N/A	$17	1%
Black: 80-120% of MSA	4%	2	0	0%	N/A	$53	3%
White: 80-120% of MSA	35%	16	0	0%	N/A	$616	36%
Black: More than 120% of MSA	4%	2	0	0%	N/A	$47	3%
White: More than 120% of MSA	24%	11	0	0%	N/A	$530	31%

HMDA Indicators of Performance in Serving Low Income Households

	Number of Loans Originated	Average Income of Applicant $000's	Percentage of Portfolio Loaned to Families with Incomes below 80% of Median	Average Loan Size $000's	Smallest Loan Made $000's	Percentage of FHA/VA/FMHA Loans Made
Black Applicants	0	$N/A	0%	$N/A	N/A	0%
White Applicants	44	$63	4%	$85	23	0%
All Applicants	46	$64	4%	$89	23	0%

Table 2.

percentage was ranked twenty-fifth. This is perhaps the most important indicator of how well an institution is serving black households according to its capacity. Logically, the dollar amount loaned is a result of the number of black applicants and the number of approved loans.

It is also important to look at the actual dollars loaned to keep in perspective the impact that large institutions such as Wachovia, NationsBank, First Union and Central Carolina Bank have in making loans to the minority community. While Mechanics and Farmers Bank, Mutual Savings & Loan and the Self-Help Credit Union do exceptionally well in serving black households, together they approved fewer loans to black households (147) than did Wachovia Mortgage Company (154). The lending behavior of larger, majority-controlled financial institutions has a tremendous impact on the availability of credit to black households and the community at large.

Average Income of Approved Applicant indicates the average income of borrowers that the financial institu-

Ranking of Financial Institutions For:
HMDA Indicators of Performance in Serving Minority Households

Bank Name	Rank for % of Black Applicants	Rank for ratio of black denials to white denials	Rank for % of Portfolio loaned to blacks	Average Score
Mutual Savings and Loan	1	1	1	1.0
Mechanics & Farmers Bank	2	2	2	2.0
Self Help Credit Union	3	1	3	2.3
Duke University FCU	5	1	4	3.3
Guaranty State Bank	6	1	5	4.0
First Union Mortgage Corporation	9	8	7	8.0
Wachovia Mortgage Company	4	15	6	8.3
Nationsbank of North Carolina	10	4	11	8.3
Central Carolina Bank & Trust	7	10	9	8.6
First Federal Savings & Loan	16	1	9	8.6
Wachovia Bank of North Carolina	7	5	15	9.0
Hillsborough Savings & Loan	8	11	8	9.0
State Employees' Credit Union	12	6	10	9.3
United Carolina Bank	11	7	11	9.6
Orange Federal Savings & Loan	18	3	12	11.0
1st Union National Bank of NC	14	9	12	11.6
Centura Bank	13	14	10	12.3
Nationsbank Mortgage Corporation	15	12	10	12.3
Citizens Saving Bank, Inc.	21	1	17	13.0
Wake Forest Federal Savings	24	1	17	14.0
1st Home Federal Savings & Loan	17	18	10	15.0
Branch Banking & Trust Company	19	13	14	15.3
Security Federal	20	16	16	17.3
First Citizens Bank & Trust Company	22	17	16	18.3
Triangle Bank & Trust Company	23	19	17	19.6

Table 3.

tion is serving. The financial institution with the lowest average income for approved applicants was ranked first and the highest average income was ranked twenty-fifth.

Average Loan Size indicates the average size loan made by the financial institution. The financial institution with the lowest average loan was ranked first and the one with the highest average loan was ranked twenty-fifth. This was done under the assumption that the lower the average-sized loan, the lower the income of the household served.

Percentage of Portfolio Loaned to Families with Incomes below 80 Percent of Area Median Income shows the dollars lent to low-income households as a percent of an institution's portfolio. The financial institution with the highest percentage of portfolio lent to low-income households was ranked first and the institution with the lowest percentage was ranked twenty-fifth.

Smallest Loan Made indicates the smallest loan size the financial institution made. This indicator was not used in ranking financial institutions, but is used to

Ranking of Financial Institutions For:
HMDA Indicators of Performance in Serving Low-Income Households

Bank Name	Rank for Average Income of All Applicants	Rank for Average Loan Size to All Applicants	Rank for % of Portfolio loaned Families with Incomes Below 80% of Median	Average Score
Self Help Credit Union	1	4	2	2.3
Guaranty State Bank	4	1	5	3.3
Mutual Savings & Loan	3	2	6	3.6
Duke University FCU	5	3	3	3.6
Central Carolina Bank & Trust	8	5	8	7.0
United Carolina Bank	13	8	4	8.3
First Federal Saving & Loan	6	7	13	8.6
Mechanics & Farmers Bank	2	25	1	9.3
Wachovia Mortgage Company	7	15	7	9.6
Wake Forest Federal Savings	9	11	11	10.3
State Employees' Credit Union	10	6	19	11.6
Centura Bank	14	13	14	13.6
Hillsborough Savings & Loan	17	12	15	14.6
First Union Mortgage Corporation	11	21	12	14.6
Branch Banking and Trust Company	15	23	10	16.0
1st Home Federal Savings & Loan	25	16	9	16.6
First Citizens Bank & Trust Company	19	14	20	17.6
Wachovia Bank of North Carolina	21	9	24	18.0
Citizens Savings Bank, Inc.	12	17	25	18.0
Nationsbank of North Carolina	23	10	23	18.6
Nationsbank Mortgage Corporation	16	24	18	19.3
1st Union National Bank of NC	24	19	16	19.6
Orange Federal Savings & Loan	18	20	21	19.6
Triangle Bank & Trust Company	20	18	22	20.0
Security Federal	22	22	17	20.3

Table 4.

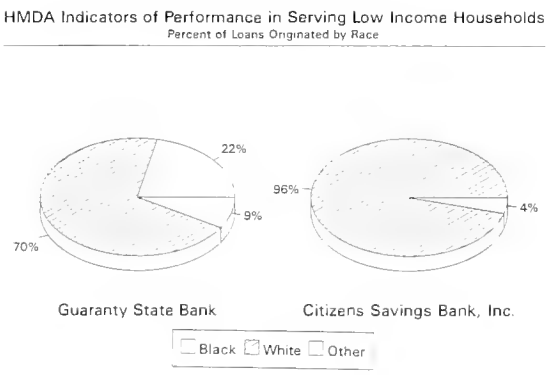

Figure 1.

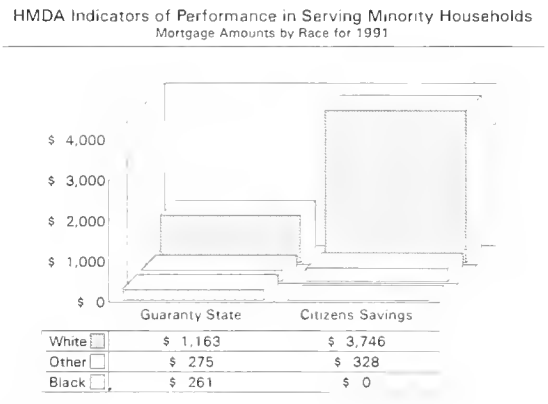

Figure 2.

indicate whether there is a practice of requiring a minimum loan amount. A policy and practice of having a minimum loan amount would have a disparate impact on black households and be illegal. However, because the scope of the analysis includes home improvement loans, a minimum loan amount policy for home purchase may be hidden by allowing for smaller home improvement amounts.

Percentage of FHA/VA/FMHA Loans Made indicates the percentage of government-insured loans originated by the financial institution as a percentage of all mortgages made. This indicator is not used in ranking financial institutions, but is used to determine whether or not the financial institution offers these products in order to serve low-income households.

Further Evaluation Studies

Data from the loan registry of financial institutions provide a rich source of raw information that can be used by regulators, lenders and activists to understand lending behavior and develop appropriate responses to improve the flow of credit to low-income and minority communities. This data could be used in other effective means of analysis.

At the federal hearing, Irvin Henderson, President of the National Community Reinvestment Coalition argued that another effective use of HMDA is to evaluate whether the market capture rate of mortgage dollars to the white and minority communities is in parity for an institution. For example, in 1990 Security Federal captured 1.3 percent of the market for mortgages lent to black households compared to 4.89 percent of the market for mortgages lent to white households. Even if the total amount lent to white households is significantly higher than that lent to black households, a financial institution can demonstrate a parity in serving black and white households if the relative percentage of the market capture rate for each is equal.

Because the 1990 and 1991 data used 1980 census tracts in recording where loans were geographically made and because of significant changes in demographic living patterns since then, a geographical analysis of lending to black versus white neighborhoods was not included in this analysis. Since 1992, HMDA data will use 1990 census tracts, therefore, a geographical analysis will be used in future analysis of lending to minority and low-income census tracts in a ranking process. This indicator will also show patterns of redlining or denying credit based on the demographic characteristics of a neighborhood.

In using Home Mortgage Disclosure Act data to identify patterns of racial discrimination, further analysis would be useful in examining lending patterns for refinancing and home improvement loans to determine disparate treatment for a variety of types of loans.

An evaluation of financial institutions' performance in community lending for compliance with the Community Reinvestment Act should not be limited to a HMDA analysis. An evaluation of other community development activities such as grant making, development loans, community service, public-private-nonprofit partnerships, and loans and technical assistance to minority and small businesses should also be included. However, the HMDA analysis in this study provides one quantitative method of ranking an institution's performance in lending to minority households and low-income households and could be used by regulatory agencies and community agencies in evaluating a financial institution's Community Reinvestment Act performance. Using the HMDA data creatively can help activists and regulators target financial institutions whose lending patterns indicate discriminatory practices and poor compliance with the Community Reinvestment Act.CP

Note

[1] Munnell, Alicia H. "Mortgage Lending in Boston: Interpreting HMDA Data." Federal Reserve Bank of Boston. October 1992. Working Paper 92-7.

The Community Reinvestment Act
Extraordinary Leverage for Disenfranchised Communities

Debbie Warren

In America, access to credit is one of the few routes to economic progress for those not born into wealth. For *communities* in our country, access to credit is critical if homes will be built and maintained; businesses will emerge, survive and grow; family farms will continue; and children will be educated. The existence of the Community Reinvestment Act (CRA) reflects the recognition that access to credit in the United States is an uneven playing field, with minorities, in particular, handicapped by inadequate net worth, little collateral, bumpy credit histories, high debt burdens and minimal relationships with key decision-makers. Furthermore, recent studies and news stories have documented the evidence of racial bias in lending.[1] The CRA has proved to be a potent tool to help level out this uneven playing field, leading to new flows of credit in inner-city, rural and minority communities.

The intent of this article is to: 1) provide background information on the CRA; 2) discuss its use in North Carolina, home of two of the nation's largest banks; 3) foreshadow what the future holds for CRA users; and 4) highlight how planning skills are critical to the advocacy process and how planners in the public and non-profit sectors can use this critical development tool.

Background on The Community Reinvestment Act

The CRA was enacted by Congress in 1977 in response to the perceived "redlining" by banks and savings & loans. "Redlining" is the practice of excluding minority, inner-city and low-income communities from access to credit. The CRA's companion pieces, the Fair Housing Act of 1968, the Equal Credit Opportunity Act of 1976, and the Home Mortgage Disclosure Act of 1975 and 1980, were all seen as tools to insure that financial institutions would use lending criteria that were both race and gender neutral.

This law says that financial institutions, banks and savings and loans associations, have a "continuing and affirmative" obligation to help meet the credit needs of their communities, including low- and moderate-income areas, consistent with safe and sound lending practices. The CRA reaffirms the financial institutions obligation to meet the "convenience and needs" of the communities from which they take deposits in order to receive a charter from the federal government. CRA, consequently, expanded and defined the federal concept of "convenience and needs" to include not only depository needs, but credit needs as well.

The CRA provides a legal framework which the community, made up of residents, businesses, and organizations, can use to encourage their lenders to respond to community credit needs such as loans for home purchase and improvement, small business startup and growth, and real estate development. CRA does not require specific loan commitments; it does encourage bank initiatives to increase dialogue, knowledge and responses to community credit needs.

CRA performance enters at two points of the federal regulatory process: 1) when a financial institution applies for a change in its status such as an acquisition, merger or branch opening/closing; and 2) during the regulators' periodic examination processes for both "safety and soundness" and "convenience and needs." The 1989 Joint Statement by the four regulatory agencies involved in the process, Federal Reserve Board, Office of Thrift

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Supervision, Comptroller of the Currency and the Federal Deposit Insurance Commission, standardized the regulators' approach to the CRA application and examination process.

Performance Evaluation

The regulatory agencies look at five broad performance categories when evaluating a bank's CRA performance:

1)Ascertaining community credit needs;

2)Marketing and types of credit extended including residential mortgages, home repair and rehabilitation, small business and small farm loans; and the institution's participation in public sector loan programs;

3)Geographic distribution of loans and the record of opening and closing branches;

4)Discrimination and other illegal credit practices; and

5)Participation in local community development projects and/or programs.

After a CRA evaluation, the bank or S&L is given a rating of outstanding, satisfactory, needs to improve, or substantial noncompliance, and the evaluation is made available to the public. In assigning the rating, the examiners are required to take into account variables such as a bank's size, expertise, financial strength, type of market it serves, local economic conditions, and the nature of the institution's competition and business strategy.

As part of their compliance, financial institutions covered by the CRA must publish a CRA Statement describing their lending community and the types of credit offered. The CRA Statement must be posted in the office of each institution. Furthermore, the banks and S&Ls must maintain a public comment file which is scrutinized by the regulators.

The regulators are a key part of the CRA process as they set the parameters for measuring CRA compliance. Most of the banks take their cues from the regulators. Unfortunately, most of the regulators are unfamiliar with the complexities of community development finance and have no contact with community representatives or public officials. The vast majority of institutions get a satisfactory or outstanding rating in these annual or bi-annual reviews. In North Carolina, for example, four of the largest banks have received outstanding ratings in the past two years. Rather than regarding CRA examination as the most challenging piece of the process, requiring the most sophisticated skills of all of the regulatory areas, the regulators are generally unschooled and focus on "safety and soundness". The appointment of a new Comptroller of the Currency by President Clinton signals upcoming reforms of the CRA examination process.

The Home Mortgage Disclosure Act

The passage of the Home Mortgage Disclosure Act (HMDA) by Congress in 1975 provided advocates with the only public source of data about bank lending in low-income and minority communities. Expanded in 1989, HMDA requires all banks, savings and loan associations and credit unions with more than $10 million in assets to report the number and dollar amounts of their housing applications and approvals by census tract, income, gender and race. Only Metropolitan Statistical Areas (MSAs) are covered by HMDA.[2]

Since the 1989 requirement that loan denials as well as approvals must be submitted to the regulators, several national and local studies have publicized patterns of major disparities in denial rates for minorities, as compared to whites of similar incomes.(See Peter Skillern's article on page 35 of this issue for a more detailed discussion on HMDA.)

Avonlea, a North Raleigh community, is a an example of affordable housing developed with CRA financing.

Interstate Banking: Critical Window of Opportunity

CRA only became an effective tool for community advocates with the passage, in many states, of interstate banking laws in the early to mid 1980's. Crossing state lines to acquire banks in profitable markets became a critical piece of the growth strategy of large financial institutions, who had swallowed up most of the profitable community banks in the prior two decades. These acquiring institutions did not want to see their deals delayed through a federal approval process extended by the filing of the CRA comment. Prior to interstate banking, bank applications focused on less critical changes in status such as opening or closing a branch office. With interstate acquisitions at stake, it was common, consequently, to see top bank officials at the negotiating table with community advocates hours after the group announced its intention to protest the merger or acquisition. Such leverage, on the part of disenfranchised minorities and the poor, was previously unheard of.

Patricia and James Ramsey live in Avonlea, apartments built with loans from area banks.

Stakeholders in the Community Reinvestment Process

In sum, the Community Reinvestment Process is a four-pronged effort involving financial institutions, community representatives, regulators and the public sector. The bankers' response to the CRA has ranged from hostility, and allegations of "blackmail" and "credit allocation," to a full recognition of the role of CRA lending in the institution's primary ways of doing business. A good CRA lender has staff with sound knowledge and growing experience in community development finance. These institutions have solid relationships with a range of community leaders, businesses and service providers, conduct aggressive marketing and outreach, and build partnerships with government programs. For them, community development lending is profitable and good business. In between these two extremes lie the banks who simply meet minimal requirements or who effectively promote their programs, often short on substance and committment, through the media.

The public sector has a broad array of tools to encourage bank participation in targeted communities to both reduce risk and minimize transaction costs. Such tools include linked-deposit ordinances under which the governmental entity only does business with institutions with an acceptable CRA record, public funds to leverage private sector investment, technical assistance for lenders and community organizations, and political goodwill for lenders with strong CRA records.

Traditionally there have been two primary objections among lenders to community development lending--cost and risk. Cost can be reduced by specializing in a particular type of lending, or shifting transaction costs to a third party. The public sector also can help reduce the high transactions cost of community development lending by supporting counselling and technical assistance activities and thus shifting transaction costs to a third party. Risks can be reduced through the use of public guarantees and subordinated loans, secondary markets, and borrower technical assistance.

The "community" is a diverse set of voices united by a common vision: to see their community's pattern of disinvestment and decline reversed. The community can be a small town, a rural county or a low-income or

minority neighborhood inside a city. CRA has been unique in the history of federal legislation in giving the "community" standing to intervene in the bank application process.

CRA Experience in North Carolina

CRA began in North Carolina in the fall of 1986, with the challenge of First Union National Bank's application to acquire a small bank near Atlanta. The comment and negotiation process was entirely carried out by legal services advocates. Subsequent challenges involved a broader spectrum of local and state advocates including representatives of small and minority businesses and farms, community-based development organizations, churches and community action agencies. Since that first challenge, the negotiating process has been carried out with all of the state's largest financial institutions and several S&Ls and community banks. Three banks have now been through this process twice.

General statements about marketing and outreach, types of lending programs, technical assistance and board diversity were common to the early statewide agreements reached between the community representatives and the bank. The second stage of CRA negotiations included specific agreements for the bank's headquarters city, in the form of administrative and programmatic grants for community development corporations. The third stage, beginning in 1991, encompassed dollar-specific statewide agreements. The program reached with First Citizens Bank, for example, involved $25 million worth of lending and grant commitments in housing purchase and development, small and minority businesses, small farms engaged in sustainable agricultural practices and capacity building of Community Development Corporations.

Park Worth is another CRA affordable housing community.

Much of the success of CRA advocacy in North Carolina is due to consistent staffing at the statewide level. The statewide legal services program has supported CRA advocacy for the past seven years, with additional financial resources provided by the Mary Reynolds Babcock Foundation. Statewide support is critical because all of the state's major banks operate on a statewide scale. Though each community has to develop its own relationships with local lenders and prioritize its own credit needs, the necessary top level support can only be achieved at the statewide level. Furthermore, statewide staffing is necessary to ensure that local groups coordinate.

The lack of consistent staffing at the statewide level is characteristic of many states, and certainly true of those in the South. As a result, successful advocacy efforts are more likely to be found in major urban centers, with the smaller cities and rural areas left behind.

Benefits of CRA Advocacy

The most important benefit has been the development of relationships between community developers, activists and leaders and the local power structure. Bankers, who are primarily white, make their business contacts through their social, civic and religious organizations. These organizations are traditionally segregated in America and consequently, key business relationships are rarely developed by the minority community. CRA brings these players to the same table, talking about credit and economic development. At some point, both parties realize that the successful development of the entire community must include the successful development of the minority and low-income communities.

Non-traditional developers have also benefitted from CRA. Cooperatives, non-profit housing developers, land trusts and Community Development Corporations typically found it impossible to secure financing from banks. Bankers did not understand their organizations or the structure of their deals and had no incentives to take the extra steps and absorb the additional transaction costs. With CRA, bankers are doing deals with these new actors in the development community.

Mortgage lending has been the most successful arena for CRA product development. Every major bank in North Carolina has an "affordable housing product", complete with reduced fees, relaxed underwriting, deeper

looks at credit blemishes, fixed 30 year rates, and counselling workshops. I estimate that approximately $500 million in housing loans for lower-income families has been extended in the past three years in North Carolina under these programs.

The reasons for this success in the mortgage arena are three. First, mortgage lending is relatively simple--standardized guidelines can be developed for these real estate deals. Second, HMDA provides the public with data about the mortgage lending performance of financial institutions. Banks don't like unfavorable publicity: they feel pressured to improve their performance. And third, the regulators do not understand small business lending and emphasize mortgage related initiatives.

CRA has also meant a greater sensitivity on the part of financial institutions to discriminatory underwriting or treatment of minority customers. Most large banks have "second review" policies where denials of minority applicants result in scrutiny by a senior lending officer. A growing number of banks provide training to bank employees on potentially discriminatory behaviors; some are engaged in testing their own staff.

Finally, CRA has enabled the public sector to more effectively administer their lending programs as well as leverage housing and commercial development dollars. Because of CRA, more banks are interested in originating and servicing city loan programs and in reducing the cost and paperwork associated with these activities. In addition, banks are now sitting down with community development staff, figuring out how private and public programs can operate in tandem. Critical public dollars are being stretched.

The primary area where CRA has not produced significant results is in small and minority business lending. Though commercial lenders now regularly call on minority businesses across the state, no bank has developed an effective program for meeting the diverse needs of these markets. Attitudes towards risk in the commercial sector remain much the same.

The converse of the explanations for the success of mortgage-related initiatives serves to explain the lack of success in the business arena. Business and commercial lending is much less adaptable to standard underwriting; lack of a commercial version of HMDA means the banks are less publicly accountable in this sphere of lending.

Future Developments in CRA

New CRA regulations are expected to be issued in January 1994. At President Clinton's urging, the regulators are looking to emphasize performance rather than paperwork processes, and to minimize the "paperwork burden" of the regulated financial institutions. It is likely that performance will be judged in the context of a local plan rather than by performance indicators.

CRA advocates continue to press for commercial loan disclosure so that rates of lending to small minority-owned businesses can be examined. Training of regulators in community development lending also remains a concern. Equally significant, Congress is likely to approve nationwide banking within the next several years. Nationwide markets will mean the further centralization of decision-making, away from the community with standardized products and underwriting, and may result in increased reluctance to lend in rural areas.

Planners and CRA

I see two major roles for planners in the CRA process, in the research phase and in the development phase. First, planners, unlike lawyers, organizers and many community developers, are comfortable with data and number crunching. These skills are necessary for the critical HMDA analyses, for helping community groups assess local credit needs, and for developing programs to meet these needs. Planners can form productive relationships with community-based developers and activists in these local CRA processes.

Second, many planners work in local and state government, developing housing and commercial lending programs with public resources. Planners can use the CRA to effectively leverage bank participation in these programs, both as lenders and as processors. In addition, planners are increasingly finding jobs with community-based development organizations. Responsible for packaging real estate deals, these planners must know how to attract bank participation and develop strategic partnerships.

Summary

The Community Reinvestment Act has been a critical tool in opening up the banking community to the needs of, and opportunities in, minority and low-income communities. Bankers now routinely meet with community leaders and developers, develop products and services to meet these needs, provide incentives for lending officers to make CRA loans, give grants to community-based development organizations, include a handful of minorities on their boards and problem-solve together. Planners must be a part of this relationship building.CP

Notes

[1]A study of mortgage lending in the Boston area by the Federal Reserve Bank (October 1992) found that African American and Latino mortgage applicants were approximately sixty percent more likely to be denied a mortgage loan than whites with similar income, credit history, debt burdens and loan-to-value ratios.

[2]Metropolitan Statistical Area (MSA) is the definition used by the Bureau of the Census to define an urban area comprising one or more counties which have a population of more than 50,000.

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